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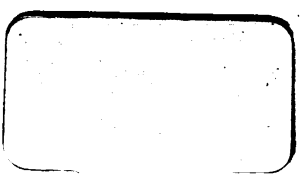

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THE ACTS

FOR

FACILITATING

The Inclosure of Commons

IN

ENGLAND AND WALES:

WITH

A TREATISE

ON

THE LAW OF RIGHTS OF COMMONS,

IN REFERENCE TO THESE ACTS;

AND

FORMS AS SETTLED BY THE COMMISSIONERS,

ETC. ETC.

Second Edition, A 3rd publd

WITH ALTERATIONS AND ADDITIONS.

BY

GEORGE WINGROVE COOKE,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:

V. & R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers,

(*Successors to the late J. & W. T. CLARKE, of Portugal Street,*)

26, BELL YARD, LINCOLN'S INN.

MDCCCL.

(1850)

LONDON:
STEVENS AND CO., PRINTERS, BELL YARD,
LINCOLN'S INN.

PREFACE

TO

THE SECOND EDITION.

SINCE the First Edition of this work was published five years have elapsed; four Amendment Acts have varied nearly all the important provisions of the original Statute; and several of the leading principles of the law relating to Rights of Common have been discussed and reviewed in the Courts. The jurisdiction over exchanges, which at first was little more than an experiment, has been so extended and perfected that every species of hereditament may now be exchanged with a safety and an economy of expense which render an exchange of real property as simple a process as the exchange of two chattels. No impediment any longer remains to the bringing every estate in England and Wales

within a ring-fence—an important advantage to every landowner whose estate is the subject of inconvenient rights, or has small outlying plots that prevent the regular cultivation of the farms.

The last report of the Commission showed that applications had been received for the Inclosure of upwards of a quarter of a million of acres; and it is understood that applications to the extent of at least 20,000 more have been received since the presentation of that report. The total number of applications has been between 480 and 490. When we consider the lapse of years which formerly occurred between the petition for the private Act and the Enrolment of the Commissioners' Award, it is satisfactory to know that forty-five of these inclosures have already been completed and the awards confirmed. The expense of inclosure was formerly so great, that even considerable tracts of land were often insufficient to bear the cost of the Act and the partition; and the instances are numerous in which that cost was barely paid by the sale of the whole of the land inclosed. From the report of 1849 it appears that the average expense of the inclosure proceedings, up to the time of the passing of the Sessional Act that authorizes the inclosure, had

been 19*l.* 19*s.* 5*d.* It is understood that the report of the present year will show no important alteration in this average.

The number of applications for exchanges has already reached 100, and this number may be expected very greatly and rapidly to increase, so soon as the extent of the jurisdiction of the Commission is generally known. So simple and so beneficial is the operation of this department of the powers of the Commission, that I have been anxious to ascertain the average cost of effecting an exchange; and I find, that where the Commissioners are satisfied by the report of some competent land-valuer that the proposal is equitable and expedient, the expense ranges from 3*l.* to 5*l.* Where the expediency is doubtful, and it is found necessary to send down an Assistant-Commissioner, of course this amount is increased.

It may be useful to add here that the process of exchange does not affect the Tithe Rent-Charge. Some doubt was entertained upon this subject, but the Commissioners have been advised that the tithe rent-charge is not one of the conditions, charges, and incumbrances which are interchanged with the lands by the operation of the words of the 147th section of the Act.

In a work of so great magnitude, and in a ma-

chinery of such complicated detail, it was not to be expected that the first statute could produce a scheme that would be found perfect in practice. If the appeals from the legal decisions of the Commissioners should ever become numerous—at present one only has been commenced, and that one abandoned—it will probably be found that the provisions relating to this part of the subject are still imperfect. But, generally, the powers of the Commission may be stated to be in good working order, and it is hoped that if any future amendments be found necessary, they may be readily comprised in a short supplement to the present edition of this work.

I have taken pains to supply all the Acts and decisions that have occurred since the publication of the First Edition, and to render reference to the whole easy. I trust that the book will be found worthy of the favour with which it has hitherto been received.

G. W. C.

2, *Brick Court, Temple.*
Feb. 1, 1850.

PREFACE

TO

THE FIRST EDITION.

This little volume has been arranged by the Editor solely with a view to the convenience of those who may be engaged in carrying into effect the statute of the last Session for facilitating the Inclosure of Waste Lands.

The introductory Treatise is necessarily but meagre, when compared with the extent and importance of the branch of law of which it treats; and it was thought advisable to insert in it many rudimental matters, which would have been omitted had it been addressed solely to the Profession. It is hoped, however, that it will be found a summary of the law sufficient for the ordinary necessities of parties inclosing under this Act.

All the forms which have hitherto been issued by the Inclosure Commissioners will be found in the Appendix, and the Editor has been at some pains to collect from parties who have commenced Inclosures under the new Act such opinions of the Commissioners upon the interpretation of the several clauses as have hitherto been intimated to those who have applied to them.

9, *Inner Temple Lane*,
Dec. 24, 1845.

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A TREATISE

ON THE

LAW OF RIGHTS OF COMMON.

CHAPTER I.

OF RIGHTS OF COMMON, AND THE SEVERAL KINDS OF COMMON GENERALLY.

SEVERAL of the writers upon the Law of Rights of Common have exercised much industry in attempting to trace the origin of their subject; and some think they find it in the Agrarian Law of the Roman republic, and in the Licinian and other laws which were enacted to regulate the right so given. In truth, however, the right of Common is indebted for its origin to no municipal law. It has always been co-existent with the disproportion of land to population; it grows restricted as that disproportion decreases; and it must every where disappear when that disproportion ceases.*

* Sixty years ago Archdeacon Paley pointed out three capital measures by which the legislature might encourage

We might expect to find contests as to rights of common first occurring in a country where herb-

agriculture. These three measures were, 1. The inclosure and partition of wastes; 2. The enfranchisement of copyholds; and 3. The commutation of tithes. The passage of his Moral Philosophy, in which this clear-headed man points to the three great agricultural reforms of the present age, is so remarkable that I venture to quote it at length:—

"There exist in this country conditions of tenure which condemn the land itself to perpetual sterility. Of this kind is the right of common, which precludes each proprietor from the improvement, or even the convenient occupation, of his estate, without (what seldom can be obtained) the consent of many others. This tenure is also usually embarrassed by the interference of manorial claims, under which it often happens that the surface belongs to one owner and the soil to another; so that neither owner can stir a clod without the concurrence of his partner in the property. In many manors the tenant is restrained from granting leases beyond a short term of years, which renders every plan of solid improvement impracticable. In these cases the owner wants what the first rule of rational policy requires, 'sufficient power over the soil for its perfect cultivation.' This power ought to be extended to him by some easy and general law of enfranchisement, partition, and inclosure, which, though compulsory upon the lord or the rest of the tenants, whilst it has in view the melioration of the soil, and tenders an equitable compensation for every right that it takes away, is neither more arbitrary nor more dangerous to the stability of property than that which is done in the construction of roads, bridges, embankments, navigable canals, and, indeed, in almost every public work, in which private owners of land are obliged to accept that price for their property which an indifferent jury may award. It may here, however, be proper to observe, that although the inclosure of wastes and pastures be generally beneficial to population, yet the inclosure of lands in tillage, in order to convert them into pastures, is as generally hurtful.

"But, secondly, agriculture is discouraged by every constitution of landed property, which lets in those who have no concern in the improvement to a participation of the

age was scanty; and accordingly we discern the first rude natural contest upon the subject of surcharging common lands, in the disputes which arose between the herdsmen of Abraham and Lot.*

profit. This objection is applicable to all such customs of manors as subject the proprietor, upon the death of the lord or tenant, or the alienation of the estate, to a fine apportioned to the improved value of the land; but of all institutions which are in this way adverse to cultivation and improvement, none is so noxious as that of tithes. A claimant here enters into the produce who contributed no assistance whatever to the production. When years, perhaps, of care and toil have matured an improvement,—when the husbandman sees new crops ripening through his skill and industry, the moment he is ready to put his sickle to the grain, he finds himself compelled to divide his harvest with a stranger. Tithes are a tax not only upon industry, but upon that industry which feeds mankind, upon that species of exertion which it is the aim of all wise laws to cherish and promote, and to uphold and excite; which composes, as we have seen, the main benefit that the community receives from the whole system of trade and the success of commerce. And, together with the more general inconveniency that attends the exaction of tithes, there is this additional evil in the mode, at least according to which they are collected at present, that they operate as a bounty upon pasturage. The burden of the tax falls with its chief, if not with its whole weight, upon tillage, that is to say, upon that precise mode of cultivation which, as hath been shown above, it is the business of the state to relieve and remunerate in preference to every other. No measure of such extensive concern appears to me so practicable, nor any single alteration so beneficial, as the conversion of tithes into corn rents. This commutation I am convinced might be so adjusted as to secure to the titheholder a complete and perpetual equivalent for his interest, and to leave to industry its full operation and entire reward."—Paley's Moral Philosophy, c. xi. s. 6.

* "And the land was not able to bear them, that they might dwell together: for their substance was great, so that

In our own country we have neither record nor tradition anterior to the existence of a property in land. Without entering upon the question of the origin of feuds and of manors, we may sufficiently understand, that since the time when the history of this island begins, a title has never been wanting in some person to every rood of land in Britain. There was every where some lord of the district, whose wealth was in proportion to the number of his retainers rather than to the extent of his lands. So long as the population was scanty, land was too abundant to be cultivated for pasture. After as much as the population could till had been parcelled out, with a reservation of services, there was still a large remaining waste, upon which the cattle used in tillage might pasture.* The waste was the lord's, but its extent was beyond his power of occupation, and the tenants of his arable lands used it until he chose to reclaim it. Among a people whose passion for independence entered into all their institutions, that which was originally a right as against strangers soon grew into a right even against the lord himself. The protection and limitation of this right† were probably among the earliest of

they could not dwell together. And there was a strife between the herdsmen of Abram's cattle and the herdsmen of Lot's cattle."—Gen. xiii. 6.

* See *Potter* v. *Sir H. North*, Ventr. 395.

† Qui pecora sua in communiâ alterius presidii seu villæ pascua immiserit, &c.—Speculum Saxon. l. ii.

the provisions of that traditionary code which we call our common law.

However this may be, it is certain that rights of common were known to our oldest text writers nearly as they are known to us at this day. Bracton, one of the earliest and most venerated of these, wrote upon this subject in the 13th century. He has a chapter on rights of common, which would not be out of place in a modern treatise; and even Bracton is compelled to cite anterior writers, and expresses himself frequently in terms drawn from the civilians.

A right of common has been defined to be a right which one or more persons may have to take or use some portion of that which another person's soil naturally produces.

Rights of common are either appendant, appurtenant, in gross, or pur cause de vicinage.

1. Right of common appendant is a right customarily annexed to the possession of arable land, by which the owner thereof is entitled to the use of the manorial waste for such purposes as are necessary to the maintenance of his husbandry.

2. Right of common appurtenant is a right depending upon a grant or upon a prescription, which supposes a grant annexing to particular lands a right of user of a particular waste.

3. Right of common in gross is a right depending upon a grant or prescription, entitling the

possessor to some user of a particular waste, without reference to any tenure of land.

4. Right of common pur cause de vicinage is the right which the commoners of adjoining wastes have of suffering their cattle to stray over each other's boundary.*

In these definitions it must be understood, that the word waste is intended to include all lands which are the subject of a right of common.

SECTION II.

Of the several Kinds of Common.

Having thus stated the several kinds of rights of common, we now proceed to consider the several kinds of subject-matters of that right.†

* Bac. Abr. tit. Common; Cruise, Dig.; Co. Lit. 122 a.

† It has been the custom of writers upon this department of our law to confuse their subject by a faulty division. Thus Bacon, Cruise, and Woolrich, all treat of "the several kinds of common," first as common appendant, appurtenant, in gross, and by vicinage, and then as common of pasture, turbary, piscary, and estovers. In truth, however, the first division applies only to rights of common, and the second only to the subject-matter of that right. It is very important to keep this distinction in view. Some writers have erred still more strangely, in making the division of the right of common a subdivision of the common of pasture; an illogical division, which surely might have struck them

We have already seen that the subject-matter of a right of common is generally all things which the soil naturally produces.

These productions have been divided by our law writers into four classes, and they treat of Common of Pasture, Common of Piscary, Common of Turbary, and Estovers.

1. Common of pasture is a right of feeding one's beasts upon another's land.

2. Common of piscary is a right of fishing in another's water.

3. Common of turbary is a right of digging turves from another's soil.

4. Common of estovers is a right of taking from another's land the wood necessary for the sustenance of the commoner's house or agriculture. The word is derived from the Norman verb *estoffer*, to furnish; but the right itself was known in England before the time of the Normans by the Saxon word *bote*. Thus house-bote is the wood necessary to repair the house; the house-fire-bote is the wood sufficient to burn in the house; plough-bote and cart-bote are the wood necessary to make and repair implements of agriculture; hay-bote is the wood necessary to the making or repairing of hays, i. e. hedges or fences; but all these are included under the general word estovers.

when they came to treat of the distinction between estovers appendant and estovers appurtenant.

To these four a fifth has sometimes been added, viz., a right of taking sand, gravel, stone, and even minerals from another's soil.*

We shall treat of these several kinds of common separately, according to their order.

* Co. Lit. 41 b, 122 a.

CHAPTER II.

COMMON OF PASTURE.

SECT. I. *Appendant.*—II. *Appurtenant.*—III. *In Gross.*—IV. *Pur Cause de Vicinage.*

COMMON of Pasture is enjoyed either as an appendancy of the ancient arable land of the manor,—or as an appurtenancy annexed to certain lands by the owner of the soil of the common,—or as an integral property vested in an individual by a grant from the lord.

I. *Common of Pasture Appendant* to ancient arable land must have existed beyond the time of legal memory,* that is, before the reign of Richard the First. It is, however, unnecessary now to prove this early origin, as we shall show hereafter when we come to speak of the proof requisite to establish a right of common.

The common of pasture appendant to ancient arable is confined to such cattle as serve for the maintenance of the plough, as horses and oxen to plough the land, and sheep and kine to compester (that is, to manure) it.†

The number of such cattle which may be turned

* Co. Lit. 122 a. † Ibid.

upon the common was originally limited to the number required in the tillage of the farm. This limitation, however, was probably found difficult to be applied, as the number necessary to till would vary in different years according to the circumstances of the tillage. The Courts therefore adopted a rule more certain in its application, namely, that a right of common of pasture appendant gives a right to turn upon the common so many commonable cattle as the land to which the right is appendant will maintain by its produce through the winter. So many as the land will maintain during the winter are said to be levant and couchant upon that land.*

The cases as to cattle levant and couchant are very numerous. It is submitted, however, that none of the decisions go to abridge the original right, which was measured by the number necessary to plough and compester, although they, in many cases, undoubtedly enlarge that right by admitting to common all cattle which the land will winter, but which are not necessary to its tillage.

Cattle levant and couchant, commonable in respect of right of common appendant, may therefore be defined to be such cattle as the land can maintain during the winter by its produce, or requires to plough and compester it.†

* *Scholes* v. *Hargreaves*, 5 T. R. 47.

† *Patricke* v. *Lowre*, 2 Brownl. 101; *Smith* v. *Bonsall*,

The origin of this double definition of levancy and couchancy probably was, that the number requisite to plough and compester was the limit to common appendant, and the capacity of wintering was the limit to common appurtenant. As we have already said, it would appear that the Courts have adopted the latter admeasurement as the most liberal and convenient in both cases. They have never, however, denied the right of common appendant to be admeasured by its original standard.

The cattle turned upon the common by virtue of the common right appendant must be the cattle which plough and compester the land to which the right is appendant.* The commoner cannot agist the cattle of a stranger for hire; † that is to say, he cannot rent his right. But if the com-

Golds. 117; *Cole* v. *Foxman*, Noy, Rep. 30; *Leech* v. *Widsley*, 1 Ventr. 54; Willes, 231; *Scholes* v. *Hargreaves*, 5 T. R. 47; *Benson* v. *Chester*, 8 T. R. 396; *Cheesman* v. *Hardman*, 1 B. & A. 711; *Whitelocke* v. *Hutchinson*, 2 M. & Rob. 205. "The rule now is," said Mr. Baron *Parke* in the case last cited, "that such cattle only are to be holden *levant* and *couchant* upon the inclosed lands as that land will keep during the winter. It has been argued that the rule includes such as the land will keep during the whole or any part of the year, but that is not so. The real question is, has this defendant turned on more cattle on the common than the winter eatage of his ancient tenement, together with the hay and produce obtained from it during the summer, is capable of producing." In this case, however, the right was claimed as appurtenant.

* 45 E. 3, 35.

† 22 Ass. pl. 84, and 11 H. 6, c. 22.

moner has no beasts of his own, but borrows those of a stranger, for the purpose of ploughing or compestering his old inclosure, he then has a special property in such cattle sufficient to entitle him to turn them on the common.*

In *Rumsey* v. *Rawson*, the plaintiff in replevin prescribed for common as belonging to the glebe, and stated that the beasts in question were levant and couchant upon the glebe, and that he put them upon the glebe by the licence of the parson. After a verdict for the plaintiff, it was moved in arrest of judgment that licence cannot be given by a commoner to put the cattle of a stranger upon his common; and the Court held, that had this objection been taken at the proper time, that is, on demurrer, it would have been fatal. After verdict, however, they would assume that the cattle were procured by the parson to compester his land.†

Common appendant is limited to such cattle as are useful in agriculture. Hogs, goats, geese, or such like, are not commonable by virtue of a right of common appendant.‡

The land to which this right is appendant is assumed to have been originally arable. The

* *Ubi supra*, and *Manneton* v. *Trevillian*, 2 Show. 328; Skin. 137; F. N. B. 180 B.

† 1 Ventr. 18, 25; 2 Keb. 410, 493; *S. C.* Tho. Raym. 171.

‡ 25 Ass. pl. 8; Finch, L. 56; *Standred* v. *Shoreditch*, Cro. Jac. 580.

law, however, will intend that all land which has immemorially had common appendant to it was originally arable,* whatever may be its present state of cultivation.†

Common of pasture, however, can only be appendant to land. Where common has been held to be appendant to a messuage or to a cottage, it appears to have been upon the ground that a messuage‡ means not only a dwelling-house, but also the land attached to it, and that a cottage§ must necessarily have had (when this case was decided) at least four acres of land appended to it.‖

As this is a right attached to the land, and not

* *Tyringham's case*, 4 Rep. 37. This intendment may, indeed, be excluded by the terms of the pleadings. Thus, if a man plead that he is seised of a house, land, meadow, and pasture, and that he and all those whose estate he has have been used from time whereof the memory of man runneth not to the contrary to have common of pasture for oxen, cows, and heifers, levant and couchant, upon the said house, land, meadow, and pasture, in 100 acres of land, whereof one A.B. was seised in fee to the said house, land, meadow, and pasture appertaining, then the Court resolved that the common was appurtenant, and not appendant, because the prescription was to have common appendant from time whereof, &c. to a house, meadow, and pasture, as well as to arable land; by which it appeared that there had been a house, meadow, and pasture, from time immemorial. But it was against the nature of common appendant to be appendant to a meadow or pasture.

† *North* v. *Cox*, 1 Lev. 253; *Scholes* v. *Hargreaves*, 5 T. R. 49.

‡ 5 T. R. 46; *Bunn* v. *Channen*, 5 Taunt. 244.

§ *Emerton* v. *Selby*, 2 Lord Raym. 1015.

‖ Under the provisions of 31 Eliz., repealed by 15 Geo. 3, c. 32.

to the person, all persons are entitled to exercise the right who are capable of holding the land. There are some cases upon this point, but it seems sufficient to refer to them.*

Common appendant often has a very close resemblance to a common of vicinage, and indeed it was said by *Littleton*, J., that a common of vicinage is but a common appendant. This dictum, however, has not been recognised, and it is well settled now that there are several distinctions between the two—distinctions which we shall set forth hereafter, when we come to treat of common of vicinage.

The case put by *Lawrence*, J., in *Hollinshed v. Walton*,† is by no means uncommon in practice. "It might happen," said his lordship, "that the freeholder claimed common appendant in three adjacent vills under the same lord, and it might happen that other tenants of the lord had only common in one of the vills." But although the freeholder in such case would common over all three vills, and upon their inclosure would be entitled to an allotment from each, his right would be a right of common appendant.

"There can be no doubt," said Lord *Ellenborough*, C. J., in the same case, "that a man may have two distinct substantial grants of right

* *White* v. *Sayer*, Palm. 211; 2 Brownl. 298; Sir W. Jones, 282; 2 Atk. 189; 2 Saund. 1; 2 Lev. 246; Vaugh. 190.

† 7 East, 485.

of common over different wastes from different lords in respect of the same tenement. It may be advantageous to him to change his pasture from time to time, for his cattle, levant and couchant, upon his tenement, and immemorial usage is evidence of such distinct grants." *

Such cases are in fact very frequent in some parts of the country, where the commoners of A. have common over wastes A. and B., but the commoners of B. are confined to waste B. The right of the commoners of A. over the waste of B. is frequently, but erroneously, spoken of as a right of common by vicinage. In truth, the commoners of A., in the case put, have a right of common appendant over the wastes of A. and B.

II. *Common of Pasture Appurtenant.*—A right of common of pasture appurtenant is a right appertaining to certain lands, by which the owner of these lands feeds cattle on the soil of another person.

This right differs from the right of common appendant, in that it does not arise of common right, and is no general manorial privilege supposed to have been conferred by all lords upon all tenants having arable land. It is assumed by the law to have been created by grant from the owner of the soil, and is therefore almost as

* And see *Barwich* v. *Matthews*, 5 Taunt. 365; 1 Marsh. 50. The case put by Lord *Ellenborough* would appear, however, to be a right appurtenant.

unfettered in its character as would be the power of the grantor.

It also differs from the right of common appendant in all those incidents which are occasioned by the origin of common appendant in the connection between the arable land of the manor and the waste. This right of common may therefore be appurtenant to lands situate in another lordship to that in which the waste is situated.* Common appurtenant is not confined to cattle used to plough and compester: but, if the prescription should so run, it may be for hogs, goats, geese, and all other kinds of animals which may be sustained upon the common.†

In all these cases the prescription presumes an ancient grant, and the usage under the prescription evidences the terms of the grant. As, however, this species of right of common may have been created by grant since the time of legal memory, cases have not been infrequent in which the actual grant has been produced, and the Courts have had to read the rights of the commoners in the terms of the instrument.

In one of these cases it was held,‡ that a grant of common for all manner of cattle included only commonable cattle: and in *Smith* v. *Feverell*,§ where defendant pleaded a licence from the lord to put cattle into the waste, *North*, C. J., said,

* Cro. Car. 482.
† Co. Lit. 122 a.
‡ 9 H. 6, c. 36, Perk. 48.
§ 2 Mod. 7.

that the licence being general to put in beasts, it should be intended only of commonable cattle, not of hogs, but that it would be otherwise if the licence had been for a particular time.

When, however, the right is claimed by prescription, and the user under the prescription has included cattle not commonable under rights appendant, there appears to be no doubt that such user will be upholden by the Courts.

Common appurtenant need not be appurtenant to the ancient inclosures or arable lands of the manor in which the waste is situated. The land in respect of which the right accrues may be of any description and in any situation.*

A right of common appurtenant may be for a certain limited number of cattle, and it would appear that when this number is once certainly ascertained, the right may be attached to a dwelling-house or to a cottage without land. Thus it has been said that the possession of a cottage in Lincolnshire gave a right of common appurtenant for a thousand sheep, and the prescription was supposed to have had good origin in a grant for the encouragement of habitation in a fen country.†

* *Sacherville* v. *Porter*, Cro. Car. 482; 2 Black. Com. 34.

† The reason is not a very good one. No person less ignorant of all rural things than our lawyers and judges of former days usually were, would ever have imagined that the power of turning out sheep, to rot, in a fen country, would be an encouragement of habitation. It was probably

The right of common for a number certain may be appurtenant also to a manor* without land.

Common of pasture without land for a certain number may be parcel of a manor and demised and demisable by copy of court roll: and if it be thus claimed in pleading by the lord of the manor, without describing the common as appendant, appurtenant, or in gross, it will be taken to be common appurtenant.†

In fact, this right when so limited appears to lose all necessity of appurtenancy to land. It has been said that it may even be severed, and the appurtenancy destroyed.‡ It may certainly be appurtenant to an office, as to a burgager in a borough,§ or even to an inhabitant of a vill.‖ It has even been said that a man may prescribe to have this right by reason of his person,¶ in which last instance we see the right of common

upon some part of the wolds of Lincolnshire, and not in the fens, that the prescription was found. The absence of agricultural knowledge in our courts of law will explain the origin of many old and otherwise inexplicable decisions upon rights of common.

* *Day* v. *Spooner*, 4 Vin. Ab. 591; *Musgrave* v. *Cave*, Willes, 319; *Stamford* v. *Burgess*, Shep. Abr. 381.

† *Musgrave* v. *Cave*, Willes, 319; 1 Selw. N. P. 421.

‡ *Bunn* v. *Channen*, 5 Taunt. 244; but see contra, *Smith & Jerdon* v. *Milward*, 3 Doug. 30.

§ *Miller* v. *Walker*, 1 Sid. 462.

‖ 1 Saund. 343; Cro. Eliz. 363; *Weekly* v. *Wildman*, 1 Lord Raym. 406.

¶ 15 E. 4, c. 33.

appurtenant becoming a simple right of common in gross.

The distinction thus made between a right of common for a limited and for an *unlimited* number, is occasioned by a principle which pervades the whole of this division of our law, that no person shall have so indefinite a right to part, as to enable him to possess himself of the whole.

The ancient remedy for surcharge of a common, was a writ of admeasurement of pasture, under which a sheriff's jury decided what and how many cattle each commoner might turn upon the waste, and the rule they adopted was to examine how many cattle might be levant and couchant upon each tenement.

After this admeasurement, any future surcharge cattle were forfeited to the king.

The old writers* say, that all commons appendant, appurtenant, or in gross for a number certain, may be admeasured. Lord *Coke* was of opinion that the writ did not extend to commons in gross:† but it is unnecessary to insist upon this point, since the writ of admeasurement has long been superseded in practice by the more expeditious and summary redress of an action of trespass, or on the case. It is mentioned here only to show how ancient was the limitation of levancy and couchancy upon rights of common

* Bract. 229; Flet. 262; Brit. 148.
† 2 Inst. 86.

appendant and appurtenant, how uniformly the Courts have insisted upon this limitation, and how closely it is interwoven wtih the remedies, which we may suppose to be almost coeval with the right.

Thus we see that the nature of the appurtenancy ceases to be important when the number is certain; it is only regarded when the appurtenancy is necessary in order to the admeasurement of the right.

When the right is limited by no specific number, it is limited by levancy and couchancy—unless it be a right in gross, of which we shall speak hereafter.

Any user of common claimed as appurtenant, and not limited in number, and not capable of being limited by levancy and couchancy, is not the exercise of a right, but the doing that which cannot possibly be other than a wrong.

The cases are not only consentient upon the point that a general claim of an unlimited right of common is a claim of a void prescription,* but they have refused to recognise such user, even

* "Si home clayme common per prescription pur touts avers commonable en le terre d'un autre come pertenent al un tenement, ceo est un void prescription, car home ne poet aver common sans number appurtenant al terre: et quant il clayme le common pur touts avers commonable, et ne dit pur avers levant et couchant sur le tenement, ceo serra intend destre common sans number selonque les parolls, car la nest aucun chose a limiter ceo quant il ne dit pur avers levant et couchant."—1 Rol. Abr. 398, pl. 3.

when granted by deed. Thus in *Benson* v. *Chester*,* the common was conveyed to trustees, in trust to allow the commoners such user of the common as they had been accustomed to have; the Court, however, here held, that such user must be taken to mean a legal user, and that a claim unlimited by levancy and couchancy could not be supported. In a very recent case Sir *L. Shadwell*, V. C., sanctioned the same doctrine.†

The propriety of these decisions, and their absolute necessity, as a point of public policy, can admit of little question. They are only insisted upon here, because so many instances are to be found throughout the kingdom in which they have been for ages disregarded, and in which an erroneous notion frequently prevails, that age has changed this illegal user into a right.

There is, however, a provision in the new General Inclosure Act, that rights of common not sustainable in law shall be held good after sixty years' user. We must humbly wait the construction of the Courts upon this clause, since, if it be taken to turn every user into a right, it will turn a surcharge into a right; and if the benefit of the sixty years' user be confined to that which is in legal language a right of common, this section will have no operation at all.

It is, however, contrary to the very essence of

* 8 T. R. 396.
† *Ivatt* v. *Mann*, 4 Scott, N. R. 362.

a right of common that one man should have power to turn out an unlimited number of cattle, by which the whole herbage might be consumed, to his sole profit.* Such a user the law considers not as a right, but as a wrong; and a man can no

* Of this nature was the *Newbury case*, mentioned by Mr. R. F. Graham in his evidence before the Committee on Commons' Inclosure.

The case laid before Sir *Wm. Follett* and Mr. *Bellenden Ker* stated, that "the common fields of Newbury were held in severalty from the 8th of November until the corn of the ensuing summer was wholly cleared; they were then thrown open for the pasturage of all kinds of cattle—not only the cattle of the proprietors of those particular lands, but of all freeholders and inhabitant householders within the town and parish of Newbury, without any stint or distinction whatever, and without reference to the possession or occupation of land. It is an undoubted fact, that the inhabitant householders, though not in possession or occupation of any land whatever, have for a very long series of years claimed and enjoyed this privilege, and it has not in the memory of the oldest inhabitant been successfully resisted."

The learned counsel before whom this case was laid were clearly of opinion that "such a right as is here claimed cannot legally exist as a right of common over the lands of another person."

The policy of the rule of law, which declares any unlimited user of a common to be an illegal user, and not a right, is well exemplified by this very case; for it is there stated that "the number of cattle seems to be unlimited, but perhaps not one-twentieth part, or a much less proportion, have exercised this right over the common fields. Of those who do exercise this right, some few do so to the injury of others, by turning out a very large number of cattle belonging to themselves, or perhaps to other people: and instances are not wanting where horse dealers have become temporary inhabitants, merely for the purpose of enjoying the benefit of the turn out."—Report of the Committee on Commons' Inclosure, p. 314.

more prescribe for it than he can for a right to clip the Queen's coin.

When a user of this kind shall be found to be of long continuance, it will be well to inquire, before declaring it illegal, whether the soil itself be not the property of the person thus using the waste. If it should be found that the soil itself belongs to the persons claiming as commoners, the user does not show a right of common, which is a right to use the natural produce of *another's* soil; but it shows an actual estate. The claimants are not commoners, but landowners. They have the soil of the waste as tenants in common.*

III. *Common of Pasture in Gross* is an integral right which enables a man, without connection of tenure, to depasture his cattle in the ground of another person. It may depend upon prescription, or may be at the present day created by grant.†

Common of pasture in gross is either for a number certain, or is, in the words of our law books, *sans nombre*. This latter term, however, does not signify an unlimited right, for, as observed by *Babington*, C.J.,‡ "a claim of common *sans nombre* cannot mean a claim of feeding for innumerable beasts, but for a number not certain; so that if

* *Benson* v. *Chester*, 8 T. R. 400; *Revell* v. *Joddrell*, 2 T. R. 415; see also Sir *Wm. Follett's* opinion upon the *Newbury case*, Report of Committee on Inclosures, p. 316.

† Co. Lit. 122 a; 4 Rep. 38; 2 Inst. 477.

‡ 11 H. 6, 22 B.

one were disseised of such a common, he might bring an assize of common *sans nombre*, according to the deed, since he would not claim a right for a defined number of cattle." Lord *Coke* intimates a similar opinion as to the limitation of this right, when he says* that there may be common *sans nombre* in gross, and yet that the tenant of the land must common or feed there also.

The cases upon this subject are numerous and contradictory.† *Blackstone* draws from them the conclusion, that it is a right possible in law, but one which, in fact, does very rarely exist.‡ The authorities, however, upon which this possibility in law rests, show that a right of common in pasture in gross *sans nombre* is limited to a right to turn on so many cattle as the common will maintain beyond the *levant* and *couchant* cattle of the lord and the commoners.

A common in gross can only be prescribed for by parties capable of taking by grant; inhabitants or occupiers, as such, cannot so take, and cannot therefore so prescribe.

In a case§ where certain inhabitants prescribed

* Co. Lit. 122 a.

† See *Saye's case*, March, 83; *Mellor* v. *Spateman*, Saund. 343, against the legality of a right of common in gross *sans nombre*; and 22 Ass. pl. 36; 11 H. 6, 22 B; 12 H. 8, 2; *Stables* v. *Mellon*, 2 Lev. 246; 2 Show. 43; Sir Thomas Jones, 115; and *Stamford* v. *Bruges*, Shep. Abr. 331, all in a greater or less degree recognising the legality of such a right.

‡ 3 Com. 239.

§ 15 E. 4, 32 B, 33.

generally for all manner of beasts, without alleging levancy and couchancy, the Court decided against the claim, stating, that a man might prescribe to have common for all manner of beasts by reason of his person, but that inhabitants, as such, were incapable of taking by prescription.

The parson of a church or like corporation sole, or a lay corporation—although these last may have an origin posterior to the time of legal memory—may prescribe for common in gross.* It has been held, however, in some early cases, that the king or the lord shall not have a common *sans nombre*.†

Many instances of user, commonly classed as rights of common of pasture in gross *sans nombre* (over commonable lands) are improperly so called. Thus, where there is a flock-master, who has the sole right of feeding his sheep over the common, his right is not properly a claim of common, but a something reserved out of the original grant.‡

IV. *Common of Pasture by reason of Vicinage.*—This is said to exist when the inhabitants of one or more townships or vills lying contiguous, or the tenants of two or more manors adjoining to each other, have been accustomed to intercommon time out of mind; the commonable beasts of either straying into the others' fields without molestation.

* 2 Bl. Com. 34; *Mellor* v. *Spateman*, 1 Saund. 343.
† 27 H. 8, 10 B; Davis, Rep. 2.
‡ Per *Tindal*, C. J., in *Ivatt* v. *Mann*, 4 Scott, N. R. 342. See *post*, p. 48.

This vicinage intercommoning has been said not to be a right but only an excuse for trespass. But it has been held, in a recent case,* that it is a right capable of being established, like other rights of common, under the Prescription Act. It is now settled that the ground and principle upon which common pur cause de vicinage rests is, that the parties interested in the respective lands over which it is claimed have, for their mutual benefit acquiesced in the practice of allowing the cattle and sheep of each to stray mutually into the lands of the other without any molestation for either.†

And first, such a right can only exist between contiguous wastes; for, if there should be three vills, A., B., and C., and B. is in the middle between the other two, B. may intercommon with A. and C., but A. and C. shall not intercommon with each other, because B. intervenes.

In an anonymous case, reported in Dyer (47 b), it was taken for granted that two vills cannot intercommon causâ vicinitatis unless they be adjoining vicinities. The case, however, was not decided upon this point, because in fact the land upon which the right was claimed was adjoining to the vill to which the right was claimed to attach.

* *Pritchard* v. *Powell*, 15 L. J. R., 168, Q. B.

† *Jones* v. *Robin*, 15 L. J. R., 15, Q. B.; *Clarke* v. *Tinker*, *ibid.* p. 17.

The facts of this case were, that two vills were adjoining, except that between them lay a large field. Both vills had common upon this field; and it was held, that such common was common by vicinage and not common appendant.

The statement in the text is not very clear, but it is well explained by the marginal note, which runs thus: "If one who has land in one vill have common with the tenants of an adjoining vill in a field lying between them, he must make title by cause of vicinage and not as appendant."

Now it is clear that he could not make title as appendant, because the waste is out of the manor. But if the cattle had been driven on the field, and not simply suffered to stray there, this case is by no means an authority to show that such common would not be common appurtenant.

"If one vill have common in another vill during one season of the year, and the other have common in the first during another season or every second year, that is not common, because of vicinage; for they do not intercommon all at one time, but at different times."*

Secondly, the right must be mutual between the commoners of the two commons; for the reason the law allows this right is, to avoid suits which would arise if actions could be brought for every trespass when there is no separation or

* Per *Baldwin*, J., Dyer, 47 b.

inclosure between the commons.* And therefore the intercommoning must take place at the same time, for if one will have common in another vill during one season of the year, and the other have common in the first during another season, or every second year, that is not common of vicinage.†

Thirdly, this right of common must have existed from time whereof the memory of man runneth not to the contrary.‡

Fourthly, the right of common pur cause, &c., does not extend to the turning of cattle upon the neighbouring common, but only to the allowing of cattle originally turned upon the home common to stray upon the other. Lord *Coke* says,§ common pur cause differs from the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity.‖

And it was ruled by *Manwood*, Justice,¶ that a commoner by cause of vicinage may not drive or

* Per *Wray*, C. J., *Tyringham's case*, 4 Rep. 37.
† Per *Baldwin*, Dyer, 47 b.
‡ 13 H. 7; 31 Dyer, 46.
§ Co. Lit. 122 a; and see 11 Mod. 73.
‖ It is said that common pur cause, &c. is in this manner. Those of Dale put their beasts in their own demesnes, and if the beasts of their own will enter upon the land of Sale, then it is not lawful to drive them thence; but if they are put into Sale it is otherwise. 13 H. 7, 13; Bro. Com. pl. 5; Dyer, 316.
¶ *Anon.* Dyer, 316 b.

put in his beasts into the other waste at first, but first in his own common, and then the beasts may well stray and go into the other common without being distrained.

The same distinction was recognised in the recent cases of *Jones* v. *Robin** and *Clarke* v. *Tinker*.†

Fifthly. This right of common can only exist between commons lying open the one to the other and may at any time be destroyed by a division of the two commons by such a fence as will keep out cattle.‡

This division must, however, be perfect, for where one of two adjoining commons, with common of vicinage, was enclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other, it was held that, as the separation was not complete, so as to prevent cattle from straying from one to the other by means of the highway, the common by vicinage still continued.§

This common of vicinage is also limited. The limitation is this,—that the commoners of neither of the commons shall turn on their common more beasts than their own common will feed.‖

* 15 L. J. R., 15, Q. B. † *Ibid.* p. 17.

‡ *Jones* v. *Robin*, 15 L. J. R., 18, Q. B.

§ *Gullett* v. *Lopes*, 13 East, 348.

‖ *Termes de la Ley*, p. 150, *et seq.*; *Sir Miles Corbet's case*, 7 Rep. 5; and see *Pritchard* v. *Powell*, 15 L. J. R., 168, Q. B.

The common of vicinage has many points of resemblance to a common appendant, or appurtenant; and when we find a user of common claimed by reason of vicinage, but offending in some of its circumstances against the foregoing rules, it will be well to consider whether such user, although bad as a common of vicinage, may not be good as a common appendant, or as a common appurtenant.‡

‡ *Vide ante*, pp. 14 and 15.

CHAPTER III.

OF COMMONS OTHER THAN COMMON OF PASTURE. — ESTOVERS. — TURBARY. — COMMON IN THE SOIL.—PISCARY.

I. *Common of Estovers.*—ESTOVERS, from a Norman word, either signifying to furnish or to sustain, is the profit which a man has in the soil of another, to cut or prune from his forest or other wastes wood for his building, inclosing, and firing, or other necessary purposes.*

The right to this common, like the right to the common of pasture, may be appendant, appurtenant, or in gross; but it may not be by cause of vicinage, the reason which allows the common of pasture by vicinage not here applying.

We have already remarked, that the term Estovers includes as its parts house-bote, plough-bote and cart-bote, and hay-bote.

The cases in the books which distinguish when this right is to be pleaded as a custom, and when as a prescription, are of little application to the purpose of this introduction. It is perhaps sufficient to observe, that the exercise of this right is governed by rules strictly analogous to those

* Bracton, 136.

laid down as governing the exercise of the common of pasture.

Thus the claim must be in respect of an ancient tenement; for even if a man have a common of this nature by grant, he cannot build new houses, and extend his common right to these.* So, if there be a prescription for fire-bote to burn in a hall, this will not extend to the consumption upon the same premises after they have been converted into a kitchen or a malt-house.† But if a house be enlarged, the fire-bote shall remain to the old chimneys;‡ or, if it be rebuilt, upon the old site. And it is a general rule, that the alteration of the quality or name of part of a house does not cause any prejudice to the estovers and services attached to it.§

Plough-bote, cart-bote, and hay-bote, if not in gross, must be necessarily appendant or appurtenant to land; and in this case of estovers we find especially marked the distinction between common appendant and common appurtenant—common claimed by custom, and common claimed by prescription.

Custom is the usage of a right throughout some ancient district, comprising many claimants within its circuit; || prescription is the continual

* 4 Rep. 86. † *Ibid.*
‡ *Brown and Tucker's case*, 2 Lord Raym. p. 100.
§ *Luttrel's case*, 4 Rep. 88.
|| See *post*, p. 65.

usage of a particular private right. A custom, however, to take a profit *in alieno solo* has been adjudged bad,* except in the case of copyholders.

Thus, in *Selby* v. *Robinson*†, a custom was set up to the effect that all the poor householders within the township had been accustomed from time immemorial to take estovers from a certain chase for necessary fuel, to be consumed in their respective dwelling-houses within the township. But the Court, after verdict finding the custom, declared it bad, for there was not any limitation. If the right had been laid as prescriptive, and as applying to *certain ancient* houses, it might have been good.‡

Copyholders may of common right take estovers, to be expended upon their copyholds, where a custom to this effect exists in the manor,§ but not otherwise.

In the absence of a specific prescription to the contrary,‖ the commoner ought to confine himself to the taking of underwood, shrubs, and loppings. Under an express grant of fire-bote,

* *Gateward's case*, 6 Rep. 59; *Bean* v. *Bloom*, 2 W. Bl. 926; *Grimstead* v. *Marlowe*, 4 T. R. 717.

† 2 T. R. 758.

‡ But see *Arundel* v. *Steere*, Cro. Jac. 25, and 256; and *White* v. *Coleman*, Freem. 174; whence it would appear that inhabitants may have this right.

§ 2 Brown, 329; 2 Saund. 320; 1 Ventr. 123, 163.

‖ *Fisher* v *Wren*, 3 Mod. 250.

however, timber may be taken in default of underwood.*

The estovers thus taken must be spent upon the premises which give the right to take them. In *The Earl of Pembroke's case*,† the commoner having house-bote cut down four trees for the purpose of repairing the posts that sustained the mud walls of his house. The wood proving unfit for this purpose, it was held that he could not exchange it for other, or enlarge the house with it, or board up the sides of the mud walls.

These estovers are inseparable from the premises which gave the right to them. So that if a man have a life estate in a house, and another grant to him and his heirs sufficient estovers to be burnt in that house, the right shall pass with the house to the remainderman.‡

Therefore, it has been laid down that common of estovers cannot exist in gross, because the reasonableness of the quantity must be limited by the necessity for fuel or repairs.§ It is submitted, however, that a prescription for a quantity *certain* of estovers would be not only good in gross,‖ but might be severed from the premises to which it was appurtenant.

II. *Common of Turbary.*—A right of common of turbary, which is a right of digging turf

* Bac. Abr. tit. Common; 3 Leon. 16.
† Clayt. 47.
‡ 8 Rep. 54.
§ 5 H. 7, 7 B, per *Fairfax*.
‖ Co. Lit. 121 b.

upon another's ground, may also be either appendant or appurtenant. The right may be appendant to any ancient tenement* within the manor, or appurtenant to any ancient tenement in or out of the manor, or may be appurtenant to a modern tenement, if there be a specific grant.

The turves, however, must be expended on the premises to which the right is appendant or appurtenant, and this even although the quantity is certain; as that the claimant should have as much turf as two men could dig in one day.† A claim in virtue of a tenement of cutting and *selling* turf, is bad.‡

An unlimited claim to cut turves and sell them, would certainly be held bad: for the prescription must be limited to some reasonable direption of

* The common of turbary must be appendant or appurtenant to a house, and not to land. "Prescription," writes Lord *Coke*, "doth not make anything appendant or appurtenant unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But things incorporeal which lie in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeal, as a manor house, or lands, or things corporeal to things incorporeal, as lands to an office. But yet (as hath been said) they must agree in nature and quality, for common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house, to be spent there." Co. Lit. 121 b.

† *Hayward* v. *Cunnington*, 1 Lev. 231; 1 Sid. 354.

‡ *Valentine* v. *Penny*, Noy, Rep. 145.

the soil; and a custom to take turves covered with grass, to be spent upon the tenements of the commoners, for the purpose of making and repairing grass-plots in their gardens, and for improvements therein, was held to be unreasonable and uncertain, Lord *Ellenborough*, C. J., saying, "A custom, however ancient, must not be indefinite and uncertain. A custom of this description ought to have some limit, but here there is no limitation."*

Inhabitants cannot prescribe for a right of common of turbary,† but it has been said that a freeman may have a right to take turves for his own use ;‡ and it has been held in one case, that a mayor and burgesses may prescribe to have such a right of common for themselves and the inhabitants of their town. §

In this case, *Vaughan*, J., said, "Though inhabitants cannot prescribe for common in their own names, yet they may be capable of the benefit of such a prescription; and as this prescription is laid upon the mayor and burgesses, they may prescribe for them and for the inhabitants, and this is the direction given in 15 Ed. 4, 29, by *Littleton*."

III. *Common in the Soil.*—Lord *Coke* mentions

* *Wilson* v. *Willes*, 7 East, 127.
† 2 Atk. 189.
‡ 1 M. & S. 474.
§ *White* v. *Coleman*, Freem. 134.

as a recognised species of common "the digging for coals, minerals, and the like."*

Thus a prescription to dig stones for the purpose of repairing the commoner's house has been recognised,† and the practice of digging sand and gravel is one of very general occurrence.‡

These prescriptions, however, must fall within the usual rules. The right must be claimed by persons capable of taking by grant, must be certain and reasonable in its nature, and must (except perhaps when the quantity to be taken is certain) be used by the commoner himself.§

IV. *Common of Piscary.*—This, like other commons, may either be appendant, appurtenant, or in gross.‖

This right of common cannot exist in the sea, or in navigable rivers, for these are open to all the Queen's subjects.¶

The right must be exercised in a reasonable manner, and according to the terms of the custom or prescription. The fish should be taken for the

* Co. Lit. 122 a.

† *Incledon* v. *Burges*, Carth. 65.

‡ 13 East, 155; *Duberley* v. *Page*, 2 T. R. 391.

§ See the recent case of *Clayton* v. *Corby*, 5 Q. B. R 415, where all the cases upon this subject were considered.

‖ 34 Ass. pl. 11.

¶ *Ward* v. *Cresswell*, Willes, 265; and see Co. Lit. 122 a, and Mr. Butler's note, 181, thereon, as to several fishery, common of fishery, and free fishery. The distinctions are not of sufficient importance to our present purpose to be discussed here.

use of the commoner's table, and not for sale; and with lawful nets; for, although the statute for regulating the size of nets extends only to havens, harbours, or creeks, or within five miles thereof, yet fishing with unlawful nets is an offence at common law.*

* *Warren* v. *Matthews*, 6 Mod. 73.

CHAPTER IV.

OF WASTES.

SECT. I. COMMON LANDS.—*The Manorial Waste. Woodlands. Stinted Pastures. Forests.*

SECT. II. COMMONABLE LANDS.—*Lammas Lands. Shack.*

HAVING thus set forth the rules which distinguish a right of common from an illegal user, it will be easy to apply these rules to any one of the infinite varieties of customs of pasturing in common which obtain throughout the country.

It has already been remarked, that the word Waste (although the usual term employed by our law writers) is but ill calculated to convey a general description of lands upon which common rights attach. These lands are generally spoken of as either common lands or commonable lands. Common lands are uncultivated wastes, upon which no severalty rights attach: commonable lands are lands which are held in severalty during a portion of the year, but which lands, after the severalty crop has been removed, are commonable. It may not be inexpedient to consider here a few of the most prevailing species of common and commonable lands.

I. *Common Lands.*—The first and most usual species of common lands is the manorial waste, where the pasture is stinted only by levancy and couchancy, and by the rights of the lord.

A second class of common lands are woodlands.

These, however, do not appear to differ in any material respect from ordinary wastes, except that they peculiarly bear the burden of the common of estovers, and that there is a right, the measure of which is determined by usage, of shutting out the commoners' stock for some reasonable time after felling, in order to the preservation of the young trees.

A third class of common lands are stinted pastures. It has, however, been doubted whether a stinted right of pasture is in reality a right of common. In *The King v. Whixley** it was said *arguendo*, "These cattle-gates are not like commons. The owners of them are tenants in common; they have a joint possession and a several inheritance, and are as much demisable as any several tenement whatsoever. There is a material difference between cattle-gates and rights of common. Lord *Coke* enumerates four sorts of common, but a cattle-gate does not come within the description of any of them. The owner of a cattle-gate has it not in respect of any custom,

* 1 T. R. 137.

but as having a joint interest in the soil, which a person having a right of common has not."

Lord *Mansfield*, C. J., seems to have adopted this definition. The court held that a cattle-gate was a tenement sufficient to create a settlement, and his Lordship said, "These cattle-gates pass by lease and release, and cannot be devised but according to the Statute of Frauds. They are therefore to be considered as a tenement within the statute."

There are also lands which in ordinary parlance are called common, although the right of pasture over them is in an individual. Such are the small plots of pasture often in the middle of a waste, called sheep-heaves, the soil of which may or may not be in the lord, but the pasture is certainly a private property, and is leased and sold as such.

These sheep-heaves obtain chiefly in the northern counties, and are possibly derived from that state of continual border warfare which was peculiarly favourable to the creation of rights of common in gross. In a country where a plunderer was every moment to be expected, it was absolutely necessary that there should be a perpetual staff of warders; and the most obvious and the least burdensome way of remunerating them was, to give them especial rights upon the commons which they watched. Thus, he who wound the horn, lighted the beacon, kept the red

spear-house, or performed any other of the more onerous and unintermitting militia duties, held rights upon the common in respect of his office. Now that the duties have ceased, the rights come down to us evidenced only by their immemorial enjoyment, and are held, and well held, by prescription.

We have a fourth class of common lands in the royal forests.

When our early kings, by virtue of their stringent prerogative, laid waste wide tracts of country to form their forests, they expressly reserved to all who had common within the territory their prescriptive rights of herbage, and other articles of common user, not inconsistent with the new purpose to which the land was now set apart.*

The jurisdiction over these forest rights was, however, taken from the ordinary courts, and vested in the justices in eyre of the king's forests, one whereof was appointed for the forests north of the Trent, and another for the forests to the south thereof. The king's lieutenant of the forest, the verderers, and chief foresters, formed a court of apportionment in case of complaints of surcharging of forests; and these officers, by virtue of a writ issuing out of Chancery, inquired into the size of the waste and of the lands which had

* *Charta Forestæ*, 9 H. 3, c. 1.

common thereon, and apportioned each man's cattle which ought to feed therein—a proceeding in the nature of a writ of admeasurement at common law.*

The office of justice in eyre of the forests, which in the time of the early Norman kings was one of high dignity and important functions,† fell into disuse as the rigours of the forest laws became relaxed; were discharged by deputy,‡ and at length were abolished by statute.§ Some of the minor offices and courts are retained, and fees in respect of them (especially for faunage) are still paid by the commoners upon the forests.

There are some few points in which common of pasture in a forest differs from a similar common over an ordinary waste.

1. When the right is appendant or appurtenant, the land in respect of which the right accrues must be within the forest: and if this land be disafforested, the common right is gone.‖

2nd. Common appendant within a forest is for all beasts except goats, sheep, and swine;¶ geese also are excluded. Common appurtenant, how-

* Manwood on Forests, p. 100, *et seq.*

† See the *Capitula Itineris* in *Hoveden, Ang. Rer. Script.* pp. 744, 784.

‡ By stat. 32 Hen. 8, c. 35.

§ 57 Geo. 3, c. 61.

‖ This distinction depends upon the 33 Ed. 1, stat. 5, *Ordinatio Forestæ. Woobridge* v. *Dovey*, Hardr. 87; and see *Sir F. Barrington's case*, 8 Rep. 136.

¶ *Webb's case*, 3 Bulst. 213.

ever, being by prescription, may include all these.*

In practice, therefore, a common of pasture in a forest will not extend to goats, sheep, swine, or geese, unless there be an immemorial usage to admit these animals to pasture.

It follows that pannage, which is the right of feeding swine upon the beech masts, acorns, &c. within the forest, must be enjoyed by virtue of a right appurtenant and not appendant. But when the pannage claimed is to take away the mast for the purpose of feeding the swine elsewhere, it would appear that the right may be appendant.

The user of the forests has been restrained by several statutes, having for their object the preservation of the timber and of the deer, but it is not within the scope of this Introduction to enter upon their provisions.

II. *Commonable Lands.*—The first and most important class of commonable lands are Lammas lands. These are open arable and meadow lands, held in severalty during a portion of the year, but which, after the severalty crop has been removed, are commonable not only to the parties who have the severalty right, but to other classes of commoners.

These commoners upon Lammas lands are sometimes the inhabitants of the parish; some-

* *Case of Leicester Forest*, Cro. Jac. 155.

times a class of inhabitants, as the freemen of the neighbouring town, or even the householders; and perhaps more generally the owners or occupiers of ancient tenements within the parish, usually termed tofts.

In the case of inhabitants we have already seen, that the user would be bad unless the right be vested in some person or corporate body capable of taking by grant; or unless the user should be held to be good after sixty years' duration, under the 54th section of the General Inclosure Act.

Where these rights are limited by number, or by levancy and couchancy, immemorial usage will make them good in law, as that every householder in right of his house, or that every freeman in right of his franchise, should turn on one beast; but if there be no such limit, the user is illegal, and no continuance of it (unless by the provision above cited) could ever turn it into a right.*

This class of commonable lands comprises very great varieties as to severalty holdings. In many instances the severalty holding varies from year to year. There are in these open lands what is called a pane of land, in which there may be forty or sixty different lots. It often happens that in these shifting severalties the occupier of

* Vide *ante*, p. 22.

Lot 1 this year goes round the whole of the several lots in rotation: the owner of Lot 1 this year has Lot 2 the next, and so on. Arable lands change not annually, but periodically, according to the rotation of the crops. Then there is the old lot meadow, in which the owners draw lots for the choice. They all, however, agree in that as soon as the crops are removed, they become commonable.

The origin of these shifting severalties was much discussed by the Inclosure Committee of the House of Commons, but with no great success. We know from Cæsar* that this tenure was common among the most warlike tribe of the Gauls; and from Tacitus† that it was equally in use among the German tribes. It is also probable that some traces of a similar custom

* Cæsar (De Bel. Gal. l. iv. c. 1), says of the Suevi that they divided themselves into two portions, one of which went out to war, while the other stayed at home to cultivate the land; each therefore taking alternately their year of tillage and pillage. He adds, "Sed privati ac separati agri apud eos nihil est; neque longius anno remanere uno in loco licet."

† The great historian writes, "Agri pro numero cultorum ab universis *per vices* occupantur quos mox inter se secundum dignationem partiuntur. *Arva per annos mutant.*" (Tacit. De Moribus Ger.) In the same treatise the historian celebrates the inordinate love of the German tribes for dice: "Aleam Sobrii inter seria exercent, tantâ lucrandi perdendive temeritate, ut cum omnia defecerunt, extremo et novissimo jactu de libertate et de corpore contendunt." It is not unnatural to suppose that among such a people the annual division of their lands was often decided by lot.

would linger among the Normans, and that in this people it would partake of their chivalrous character, and the distribution be decided by single combat.

In times posterior to the Conquest land has been granted upon many whimsical tenures.

These curious shifting severalties are therefore assignable to no single origin, but are probably the residue of the tenures of all the different races which have possessed the island. Some may even be derived from the Gauls, who first colonised the country, and may be attenuated descendants of the custom preserved by Cæsar. The lot meadow, possibly derived from the Saxons, may be the modern version of the custom described by Tacitus; while in the rule, still extant in some places, of awarding a choice of lots to the best runner or the best wrestler, we may possibly recognise a Norman origin.*

A second portion of commonable lands is Shack land; land over which a custom to go at shack, which signifies to go at large, prevails.

This shack land is open arable land, held in severalty during a portion of the year, namely, until the crop has accrued. After the crop has

* These remarks, suggested by a conversation in the Commons Inclosure Committee, have little relation to the practical objects of this little treatise; but it may perhaps be pardoned, even to a law writer, that he glance for a moment at these interesting memorials of early ages, now when they are about to be destroyed for ever.

been removed, these lands become commonable to all the parties having a severalty right, but to no others.

The practice often is, that this intercommoning shall be without stint. Such practice, however, is certainly illegal. Much of the law upon this subject will be found collected in Serjeant Wilson's note to *Sir Miles Corbet's case*,* whence it appears that the Courts have likened this custom to a common of vicinage, and have intimated that it is subject to the same limitation, and even, if usage should authorize it, to the same power of inclosure.

The severalty holders upon shack lands are usually the holders of the fee of their several portions.†

The prescriptive rights of flockmasters have usually been referred to this division. The case of *Jones* v. *Richards* is a leading case upon this subject.‡ There the owner of the farm of B. prescribed for the sole and exclusive right of

* 7 Rep. 5.

† These commonable lands have hitherto been unnoticed by law writers. I am indebted for the foregoing account to the evidence, before the Commons Inclosure Committee, of Mr. Blamire, a gentleman who may well be considered as the author of the three great rural reforms of the age—commutation of tithes, enfranchisement of copyholds, and inclosure of commons; and upon whose judgment we may rely with a comfortable assurance, in all things wherein profound sagacity and unwearying assiduity can secure correctness.

‡ 6 A. & E. 530.

pasture and feeding of sheep and lambs on L. The Court held that this did not give him a right to take in the sheep and lambs of other persons to pasture on L., inasmuch as by the terms of the prescription some interest remained to the lord. Lord *Denman*, C. J., in delivering judgment, said, "By the terms of this prescription the grantee's right is limited to the feeding of sheep and lambs. This would be wholly insensible if the entire pasture were granted to him in exclusion of the lord. Further, the right to feed by sheep is not limited by number, so as to make it indifferent to the lord by whose sheep the pasturage is enjoyed, but is a grant to the occupier of Blaenmerin, and is appurtenant to that farm. *The principle seems to be, to ascertain the extent of the rights conferred and the rights reserved by the grant, and to see whether the act be in derogation of the latter.*"

CHAPTER V.

ON THE CREATION, ALIENATION, AND EXTINGUISHMENT OF RIGHTS OF COMMON.

EVERY right of common is created either by an act of parliament, evidenced in modern times by a custom; or by a grant, which may be evidenced either by a prescription or by the deed itself.*

A common cannot be created by means of a bargain and sale, for the object of sale is not *in esse*.†

The grant must be by deed.‡

With respect to the alienation of rights of common, common appendant will pass under a conveyance of the land to which it is appendant; for it is a rule that whatever is incident to land will pass by the description of land.§ Nor can

* Every custom supposes an Act of parliament, or a law made in former times by an equivalent power; but a prescription supposes only a grant. *Harland* v. *Cooke*, Freem. 320.

An act, however, will not be presumed in favour of an unreasonable custom, and a prescription cannot exist in that which cannot be granted. *Weekly* v. *Wildman*, 1 Ld. Raym. 407.

† *Speaker* v. *Styant*, Cro. Jac. 189; Comb. 127.

‡ *Supra*, and 2 Ro. Ab. 63; 1 Ro. Ab. 102.

§ *Solme* v. *Bullock*, 3 Lev. 165; *Sacheverill* v. *Porter*, Cro. Car. 482; 2 Ro. Ab. 60. As to whether a custom to

common appendant be otherwise conveyed than with the land to which it is appendant.

Common appurtenant, so long as it continues appurtenant, will also pass by any deed which grants, bargains, and sells, leases and releases, licenses or devises the land to which it is appurtenant. It is only when the right is for a fixed number of cattle that it can be granted away as a substantive property, severed from its dependence upon land.

Common in gross for a certain number of cattle differs in no respect from that just mentioned, and may be passed in the same manner by deed. But it is said that common in gross, *sans nombre*, can only be granted over when enjoyed in fee, and cannot be aliened by grantees in tail for life or for years; and the reason assigned is, that it would be to the prejudice of other commoners, that an unlimited licence to depasture should be passed to one who has a thousand sheep, while the original grantor might have had but a hundred.* The reason is not very conclusive; nor would this doctrine, probably, be sustained in the present day.†

By a grant of all demesnes, the waste itself will

demise rights of common by parol can be supported, see *Lothbury* v. *Arnold*, 1 Bing. 219; 8 Moore, 72; *Rex* v. *Lane*, 1 D. & R. 76; 5 B. & A. 488.

* 2 Rep. 73; *Stampe* v. *Burgesse*, 1 Ld. Raym. 407.

† See *Jones* v. *Richards*, 6 A. & E. 530.

pass,* and so strong is the general principle already quoted, namely, that whatever is incident to land will pass by the description of land, that it has been said that a common appendant or appurtenant will so pass, even although the common were expressly reserved.†

But as the usual general words are unnecessary to pass a right of common dependent upon land, so are they incapable either of creating or reviving such a right.‡

A right of common may be extinguished by several means.

1. By unity of possession. When the ownership of the whole of the land which gives the right, and that of the land which is the subject of the right, unite (by purchase) in the same person, the right of common becomes extinguished.§

In *Tyringham's case*,‖ it was resolved that where common is appurtenant and not appendant, and so against common right by purchase of part of the land, all the common is extinct.

And in the same case it was further resolved that unity of possession of the whole land, to which, &c., and of the whole land in which, &c., makes extinguishment of common appendant.‖ "The reason of which opinions was, because the

* 2 Keb. 577. † 7 T. R. 647.

‡ *Marsham* v. *Hunter*, Cro. Jac. 253.

§ *Tyringham's case*, 4 Rep. 38; *Nelson's case*, 3 Leon. 128.

‖ 4 Rep. 38 a.

land to which the common was claimed was ancient land hide and gain, and for maintenance and advancement of tillage; but inasmuch as it was against a rule in law when a man has as high and perdurable estate, as well in the land as in the rent, common, and other profit issuing out of the same land, then the rent, common, and profit is extinct."

In *Nelson's case*, reported in 3 Leonard, 128, the Abbot of D. was seised of a common out of the lands of the Abbey of S., as appendant to lands of the Abbot of D. After the dissolution the king granted the possessions of the abbeys to different grantees: the Court of Common Pleas held that the right of common was extinguished by the unity of possession in the Crown.

But where a copyhold tenement, to which a right of common was attached, vests in the lord by forfeiture, and he re-grants it as copyhold, to hold according to the custom of the manor, a right of common continues appendant to the land.

2. A right of common may be extinguished by release from the commoner to the lord, and it has been said that by a release of any portion of his right, even yielding up his profit in one acre only, his common in the whole waste is gone. This doctrine has, however, been much discredited by more recent cases.*

* Cro. Eliz. 594; 1 Brownl. 180; 1 Show. 350; 3 Keb. 24.

3. By the dissolution of the estate to which the common is appendant.*

Thus, where a copyholder purchases the freehold of his estate, he loses his right of common,† if the soil of the common be the soil of the lord,‡ and if the common be not specifically re-granted. And when a corporation having common in gross is dissolved, the right is extinct.§

In *Badger* v. *Ford*,‖ *Abbott*, C. J., in delivering the judgment of the Court, said: "When a copyhold tenement is seised into the hands of the lord, it does not therefore lose its right of common; for that right is annexed to all customary tenements, demised or demisable by copy of Court roll; and while the estate remains in the lord it continues demisable. If, indeed, the lord grants the fee to a copyholder, it can never again become a copyhold estate, for it ceases to be demisable by copy of Court roll. In this case, if the lord had brought an action against the plaintiff for turning on his cattle, there can be no doubt that he might have pleaded that this was a customary tenement, demisable by copy of Court roll; and that by custom of the manor all such tenements had a right of common."

4. Lawful inclosure of the common necessarily works an extinction of common rights; and this

* 8 T. R. 401.
† *Fort* v. *Ward*, Mo. 667; Cro. Jac. 253.
‡ Dyer, 339 a. § 27 Hen. 8, 10.
‖ 3 B. & A. 153.

may be either by the lord, in virtue of his power of approvement, of which we shall have occasion to speak hereafter; or by general agreement among the lord and commoners; or by act of parliament; or, lastly, by usurpation, legalized by lapse of time.

There are also some ancient decisions, in which it has been held, that by inclosing or taking a lease of any portion of the waste a commoner suspends his right of common during his actual severalty enjoyment.*

With respect to revival of rights thus extinguished or suspended, we have already seen that this revival does not accrue from general words, such as all commons appertaining, &c., because the right is no longer in existence. The general rule, however, is, that if a grant be made of all commons used or occupied with the land conveyed or leased, an extinguished right will revive.†

A licence to put beasts upon a common must be confirmed by deed.‡

Parceners or joint-tenants of rights of common cannot devise by reason of the accruing survivorship. If one aliens his rights to another, the transmission must be by release.§

There are some commonable rights, however,

* 11 Hen. 6, 22; 9 Rep. 135 a.
† Cro. Eliz. 570, 794; Cro. Jac. 253.
‡ *Monk* v. *Butler*, Cro. Jac. 574; Cro. Car. 482.
§ 2 Cru. Dig. 504.

which cannot be divided among coparceners as a common in gross *sans nombre*. In such case the right of common must be enjoyed by one of the parceners, and an equivalent allowed out of some other part of the estate, or each parcener must have the alternate enjoyment for a certain time.*

* Co. Lit. 165 a; Fleta, 314.

CHAPTER VI.

OF THE RIGHTS OF LORDS OF THE SOIL, AND OF COMMONERS.

SECT. I. RIGHTS OF THE LORD.—*To Approve—to Common—to Mines.*

SECT. II. RIGHTS OF THE COMMONER.—*Dependent upon Custom or Prescription—What Customs are good.*

I. *Rights of the Lord.*—THE lord of the soil is, according to the old law maxim, owner of every thing upwards to heaven and downwards to the centre, except such things as custom, usage, or grant, has conferred upon the commoners.

So long, therefore, as he does not interfere with their rights, he may use the land and the produce thereof as absolutely as if no right of common had place upon it.*

While sufficient common is left to the commoner, the owner of the soil may plant trees, breed conies,† depasture cattle, grant licences to strangers, and inclose or, as the law terms it, approve the waste.

* 3 Cru. Dig. 93; 2 M. & S. 184.
† 1 Lutw. 107.

In ancient times these rights were doubtless of more value than they are at present. Long after the origin of manors, the waste was sufficient to depasture all the cattle used in agriculture, and to leave a large residue to the lord. As, however, the cultivated lands have gradually increased, and have all by usage and efflux of time obtained the privileges of ancient arable land, it became rare to find a common which could sustain more cattle than might be levant and couchant upon the old inclosures to which it was attached. Where any such is now left, there can be no doubt of the law that, in the absence of an express prescription to the contrary, the overplus belongs to the lord of the soil.

The right of inclosing the superfluous waste, or, as it is technically called, the right of approvement, was granted, or, more properly, confirmed, to the owners of the soil of waste lands by the Stat. of Merton (20 Hen. 3, c. 4); extended by the Stat. of West. 2 (13 Ed. 1, c. 1), and confirmed by the 3 & 4 Ed. 6, c. 3. Many decisions upon the construction of these statutes are recorded by our older reporters; but the privilege is of too little practical value in modern times to require more than an allusion in this Introduction.

The lord has also other rights in the waste, which he exercises without the condition of leaving sufficient common for the commoners.

By the Stat. of West. 2, it is declared, that by

occasion of a windmill, sheep-cote, dairy, enlarging of a court, necessary, or curtilage, none shall be grieved by assize of novel disseisin for common of pasture.

This act has been liberally construed by the Courts, and Lord *Coke* says that the five cases above mentioned are put only for examples. It seems clear that a lord may build a house for himself or his herdsman upon the waste, without reference to sufficiency of common left, and this although the inclosure for the building should absorb two acres out of a common consisting of but three.*

It must be remembered, however, that the statute applies only to common of pasture. Other commons, such as turves or estovers, must not be injured by such building.†

It is also one of the rights of the lord, that he shall have common for his own cattle upon his own waste; and of this, so long as the waste continues a common, no prescription can deprive him, nor is such his right dependent upon there being a sufficiency of common for the other commoners.

"If a man," says Lord *Coke*, "claim by prescription any manner of common in another's land, and that the owner of the land shall be ex-

* *Nevill* v. *Hamerton*, 1 Sid. 79; *S. C.* 1 Lev. 62; *S. C.* 2 Keb. 283, 314.

† *Duberley* v. *Page*, 2 T. R. 391; and see *Shakespeare* v. *Peppin*, 6 T. R. 747.

cluded to have pasture, estovers, or the like, this is a prescription or custom against the law, to exclude the owner of the soil, for it is against the nature of this word *common*, and it was implied in the first grant that the owner of the soil should take his reasonable profit there, as it hath been adjudged. But a man may prescribe or allege a custom to have and enjoy, *solam vesturam terræ*, from such a day to such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil from feeding there."*

The validity of a prescription for the separate pasture has been much disputed. In the first case the Court of Common Pleas was equally divided:† in the second, the Court of Queen's Bench was inclined to think the prescription good, but the case went off:‡ in the third, the whole Court of Queen's Bench adjudged for the prescription,§ and this doctrine was recognised as fully established in the recent case of *Welcome* v. *Upton*.‖

These cases, however, merely show that this ordinary right of the lord may be taken away by a specific prescription of separate pasture, which

* Co. Lit. 122 a.
† *North* v. *Cox*, Vaug. 251; 1 Lev. 253.
‡ *Potter* v. *North*, 1 Saund. 347.
§ *Hopkins* v. *Robinson*, 2 Saund. 324.
‖ 6 M. & W. 543.

of course presumes a grant. It is still however understood, that the lord cannot be excluded from his common in the waste. In the recent case of *Ivatt* v. *Mann, Tindal,* C. J., observed, "A separate right of feeding and folding is not a claim of common, properly so called, but something reserved out of the original grant."*

We shall presently however see, that although the lord cannot be altogether excluded from his common, he may by prescription be partially so excluded.

So, the lord may sink shafts to work mines, and use all necessary and lawful means to procure coal or other materials from the soil, doing as little damage as possible;† and may dig brick earth,‡ and breed game,§ make fish-ponds, or plant trees.

In the exercise of all these rights the lord may be controlled by prescription or custom; and an action will lie against him, at the suit of a commoner, for a surcharge of any kind, or for any unnecessary opening of the soil, whereby the commoner's cattle are injured. But the commoner cannot by his own act remedy an injury done to the common by the lord. Thus, where commoners have cut down trees, filled up cony burrows, or destroyed fish-ponds, the Courts have

* 4 Scott, N. R. 342.
† 1 Keb. 390.
‡ 5 Vin. Abr. 7 and 39, per *Windham,* J., in the notes.
§ *Hassard* v. *Cantrell,* 1 Lutw. 107.

always held that they were not justified, and that the commoner had no right to meddle with the soil.* Nor has the commoner any right to meddle with the soil, even for the improvement of the waste—as to dig a trench, to let off water, or cut molehills or bushes—without a special prescription for that purpose.† If the commoner suffer by the lord's user of the soil, his remedy must be sought at law.

This rule, however, is to be understood to be confined to acts of the lord which are legal in their character, although wrongful in their excess; for it has been held that a commoner may throw down fences wrongfully set up, even although he might enjoy his common, but less beneficially, without throwing them down.‡

The commoner has no right to come upon the common for any other purpose than to exercise his right, and it has been held that he cannot justify against an action of trespass the coming to put his cattle into the waste, unless he has actually put them in, or unless he came for the purpose of seeing if the pasture were in a fit state to receive his cattle.§

A fortiori, therefore, a stranger has no right

* *Cooper* v. *Marshall*, 1 Burr. 259, 265; Ow. 114; *Coo* v. *Cawthorn*, 1 Keb. 390; *Kirby* v. *Sadgrove*, 1 B. & P. 13. In *Howard* v. *Spencer*, 1 Keb. 884, it was said by a learned Judge that a commoner might make such an abatement against a stranger, but not against the lord.

† *Howard* v. *Spencer*, 1 Sid. 251.

‡ *Arlett* v. *Ellis*, 7 B. & C. 346.

§ *Spelman* v. *Hermitage*, 5 Vin. Abr. 35.

upon the waste, and is liable to an action of trespass, at the suit of the lord, for walking or riding there.*

2. *Rights of the Commoners.*—While in the due exercise of his rights, the commoner is, of course, not answerable for any damage which accrues to others from their own negligence or misconduct. Thus, if the lord sets up a stack of corn upon the common, and the commoners' cattle eat it, or if the owner of land in an open field, commonable after harvest, should leave his corn uncut after harvest time, in order to defeat the right of the commoners, and the commoners' cattle eat it, in neither case will there be remedy against the commoner.† So, where one had common for beasts levant and couchant in a certain field while it lay fresh and was not sown, and he put in his cattle when part of it was sown, it was held, that by reason of the partial sowing the commoner should not be barred from his common in the residue of the field, otherwise a part might be sown every year, to deprive the commoner of his right.‡ So, where there is a right of common after the corn is taken away, the owner of the soil shall not be allowed, by sowing peas, to suspend the benefit.§

* 5 B. & A. 315.
† *Farmer* v. *Hunt*, Cro. Jac. 271; 2 Leon. 202.
‡ *Trulock* v. *Rigsby*, Yelv. 185; *S. C.* 1 Brownl. 188.
§ 12 Mod. 648.

We have already seen, that in his user of the common the commoner is limited to his reasonable exigencies for the purposes for which they are conferred. Thus, the pasture must be for his own cattle; the turves or fire-bote, a reasonable quantity for the fuel of the chimneys to which it is attached; the estovers, a reasonable quantity for the repair of his own fences or farm implements.

The principle upon which acts of user of a common may be tested, has been very clearly and succinctly stated by Lord *Denman*, in the modern case of *Jones* v. *Richards*.* "The principle seems to be," said his lordship, "to ascertain the extent of the rights conferred, and of the rights reserved, by the grant, and to see whether the act be in derogation of the latter."

The ascertaining the terms of the grant, however, is the point which will be presented to the assessor in questions of rights of common, as that of by far the most frequent occurrence, and the most practical importance.

The terms of the grant may vary, increase, or straiten the ordinary rights both of lord or commoner, until the lord may be left with scarcely more than a nominal right to his soil, or the commoner may be reduced to a worthless right of pasture.

These terms can, in ordinary cases, only be

* 6 A. & E. 530

ascertained as the grant itself is ascertained,—by long usage. Usage beyond memory of man is presumed to have had its origin in a legal instrument, which granted the rights as they are now enjoyed.

It follows, therefore, that the rules above laid down, as the result of decisions upon the rights of the lords of the soil and commoners, are not in all instances absolute, but are only so when founded upon statute, or when not contradicted by some uniform and ancient usage, amounting to a legal prescription or a legal custom.

It may not be improper in this place to explain the distinction between a prescription and a custom, words which are not unfrequently used by the early law writers indifferently, but which are nevertheless very distinct in their legal signification.

The difference between custom and prescription is, that custom is local, as prevailing in some certain known district, such as a county, hundred, or parish: prescription, however, is for the most part personal, attaching to a certain person and his ancestors, or a certain person and those whose estate he has, or to a body politic and their predecessors.*

Custom and prescription differ in these things: that custom must be limited and confined to some certain place; prescription is at large: custom is

* Co. Lit. 113 b; 6 Rep. 60; 8 Rep. 62.

common to all the persons and lands within the limits wherein it is alleged, but prescription is confined to certain persons and things. But in this they agree, that they must be constant, without interruption, and perpetual from the time whereof the memory of man is not to the contrary; for, if there have been frequent interruptions, there can be no custom or prescription obtained; but after a custom or prescription is once duly obtained, a disturbance for ten or twenty years will not destroy it.*

We shall see hereafter that there is an important distinction in the rules of evidence, as to the proof admissible to establish a custom, and that admissible to establish a prescription.

It becomes now necessary to examine what customs and prescriptions in relation to rights of common the Courts have upheld, and what they have rejected as bad, for it is a very early maxim of our law, that *malus usus abolendus est.*

Every custom is bad which is unreasonable, uncertain, savours too much of arbitrary power, and tends to make a lord of a manor judge in his own cause.†

So a custom for the lord to grant leases of the waste, is bad,‡ the Court saying, that they could

* Degge, 354, 7th ed.

† *Wilkes* v. *Broadbent*, 1 Wils. 63.

‡ *Badger* v. *Ford*, 3 B. & A. 153; *Drury* v. *Moore*, 1 Star. 102.

never suppose that the lord would have originally reserved such a power to himself as might enable him to annihilate the common altogether.

But a custom for the lord to grant parcels of the waste, with the assent of the homage, is a reasonable custom.*

So, a custom for commoners having right of turbary in a moss, to hold certain moss dales in severalty when cleared of the turves, was held good.†

In this case the Court said, "Where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of his right, a grant is presumed; and therefore, if the occupier of a certain messuage has enjoyed it, he must claim it by prescription; but when the claim depends on a general rule of property within certain limits, it is alleged as a custom, or *lex loci*. All local or real property must be governed by such law; it has no relation to persons out of the limits; property in England, Ireland, Jersey, &c., must be enjoyed according to the laws of each. So this moss, though granted to persons out of the manor, must be enjoyed subject to the laws of the manor."

So, when the soil is in the commoners, a pre-

* *Folkard* v. *Hemmett*, 5 T. R. 417, n.; *Boulcott* v. *Wenmill*, 2 Camp. 261.

† *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.

scription to inclose mutually against each other is good.*

A custom for commoner with right of fishery to cut rushes by a river, in order to preserve the fishery, is good.†

Or to dig trenches for letting off water and improving the waste,‡ or to cut bushes, or dig molehills, for the same purpose.§

We have already seen that all such interference with the soil of the common, or with its produce, not included within the commoners' right, requires a special custom or prescription to authorize it.

A custom to have sheep fed on the common folded at night on a particular farm, has been held good.‖

In *Wilson* v. *Willes*,¶ the custom set up was, that within the manor there had immemorially been an ancient custom, that all the customary tenants respectively of all the customary tenements having a garden have immemorially dug, taken, and carried away, and have been used and accustomed to dig, &c., in, upon, and from the said close, by themselves and their farmers and tenants respectively, occupiers of such customary

* *Drake* v. *Doyly*, Noy, Rep. 14.
† *Bean* v. *Bloom*, 2 W. Black. 926.
‡ Godb. 182.
§ *Howard* v. *Spencer*, 1 Sid. 261.
‖ *Brook* v. *Willett*, 2 H. B. 224.
¶ 7 East, 121.

tenements with the appurtenances respectively, for the time being, to be used and spent in and upon their said customary tenements with their appurtenances respectively, *for the purpose of making and repairing grass-plots in the garden*, parcels of the same respectively, for the improvement thereof, such turf, covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent, every year, at all times of the year, *as often and in such quantity as occasion hath required*, as to the said customary tenements with the appurtenances respectively belonging and appertaining. Lord *Ellenborough*, C. J., said, "A custom, however ancient, must not be indefinite and uncertain; and here it is not defined what sort of improvement the custom extends to: it is not stated to be in the way of agriculture or horticulture: it may mean all sorts of fanciful improvements; every part of the garden may be converted into grass-plots, and even mounds of earth raised and covered with turf from the common: there is nothing to restrain the tenants from taking the whole of the turbary of the common, and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom, as laid, but caprice and fancy. Then this privilege is claimed to be exercised when occasion requires. What description can be more loose than that? It is not even confined to the occasions of the garden. It resolves itself,

therefore, into the mere will and pleasure of the tenant, which is inconsistent with the rights of all the other commoners, as well as the lord. The third special plea also is vastly too indefinite: it goes to establish a right to take as much of the turf off the common as any tenant pleases, for making banks and mounds on his estate: it is not even confined to purposes of agriculture. All the customs laid, therefore, are bad, as being too indefinite and uncertain."

We have already seen that a prescription to shut the lord out from user of the common is bad.*

But a prescription to exclude the lord for a limited period may be good, and generally a custom for a stinted pasture is good.

As, when the custom was to exclude the lord from the time of cutting and carrying the corn, till Lady-day:† so, to have herbage and pasturage on lands not sown.‡ Or that the common should be fallow every second year until Lady-day, after the corn was carried.§ So, a custom that the lord should have common to himself until Lammas-day, and afterwards for the tenants to have it, with the exception of three horses, which the lord might put in.‖

And a custom must not be contrary to the general law of the land.¶

* *Ante.*
† Fitz. Pre. 51.
‡ 2 Ro. Ab. 267.
§ 1 Ro. Ab. 405.
‖ Cro. Jac. 208.
¶ *Rex* v. *Saltern*, Cald. 444.

A custom for the inhabitants of a particular place to take a profit *in alieno solo*, is bad. A right to take such a profit can only be by prescription,* and inhabitants are incapable of so taking.

So, a custom for poor and indigent householders to cut and carry away rotten boughs and branches in a chase, is bad, the description of persons entitled being too vague.† It would probably be bad also for the reason given in the case last quoted.

It must frequently happen that the prescriptive rights of the lord and the commoners encroach on each other; as when the lord's right to take his minerals makes such waste in the common as to leave no sufficient pasture.

It would appear, that in such cases the right of the lord, being the anterior and original right, must prevail, provided that the usage necessarily suggests the presumption that the right claimed and enjoyed was reserved in the original grant, without restriction, as to the encroaching upon the rights of the commoners. In *Bateson* v. *Green*,‡ which was a question as to the right of the owner of the soil to dig clay-pits of great size, not filling them up again, and leaving no sufficient common for the commoners, the evidence showed an enjoyment of the right for seventy

* *Grimstead* v. *Marlowe*, 4 T. R. 717.
† *Selby* v. *Robinson*, 2 T. R. 758.
‡ 5 T. R. 416.

years, during all which time the common was insufficient to the cattle of the commoners.

A verdict against the custom was set aside, *Buller*, J., saying, "This case does not fall within the Statute of Merton, but depends altogether on immemorial custom, as to the extent of the several rights claimed by the lord and the commoners. Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other. It may be either the lord's right which is subservient to the commoners', or the commoners' which is subservient to the lord's. In general, one should say that the lord's is the superior right, because the property of the soil is in him: but if the custom established by evidence show that it is subservient to the commoners', then he cannot use the common beyond that extent: otherwise he subjects himself to an action for the excess. But here the evidence shows that the commoners' right to the enjoyment of the common has always been subservient to the lord's, for he has always dug common when, where, and in what manner he pleased; though, for a great number of years past, it was proved that there was not a sufficiency of common, as claimed by the tenants. There are the marks of old pits dug there, which are now covered again with herbage; and, it appears, for seventy years past he has from time to time dug clay for the

purpose of sale, and licensed other persons to do the same. There is no evidence to contradict this; and therefore there is no foundation for the verdict which has been given."

The lord and the commoners have together power to regulate the exercise of the common rights, some of which depend upon enactment, and some obtain by custom.

Thus, by 13 G. 3, c. 81, s. 15, lords of manors are empowered, with the consent of three-fourths of the commoners, at a meeting to be held after fourteen days' notice, to lease a twelfth part of their wastes by auction, for a term not less than four years, and to employ the rent in draining, fencing, or otherwise improving the residue.

By the next section of the same act it is provided, that in case of stinted commons, an assessment may be agreed to at a meeting similarly called, and levied upon the commoners, with a power of distress.

The lord may also by custom summon a jury, and, with their consent, make by-laws for the preservation and regulation of the common, and an action will lie for a penalty under such by-laws.*

* *James* v. *Tutney*, Cro. Car. 497.

CHAPTER VII.

OF INCLOSURES.

SECT. I. *By the Lord.*—II. *By Agreement between the Lord and the Commoners.*—III. *By Act of Parliament.*—IV. *By Encroachment.*

WASTES have been inclosed either by the lord,—or by agreement between the lord and the commoners, or—by act of parliament;—or, lastly, by encroachments illegal in their origin, but legalized after efflux of time by virtue of general acts of limitation,

I. *By the Lord.*—In treating of the rights of the lord, we have already spoken of that power of inclosure which the lord possesses, and which, in legal language, is called approvement.*

II. *By Agreement between the Lord and the Commoners.*—Previously to the Inclosure Act Commission, the law recognised no person as having any right upon a waste except the lord and the commoners. These parties, therefore, if they were all consentient, could—and indeed they still can—inclose the waste, and parcel it among themselves.

* *Ante*, p. 58.

The practical difficulties in the way of such an inclosure are, however, obvious. To obtain the unanimous concurrence of a numerous body of commoners was seldom possible; and even if this difficulty was surmounted, it could rarely happen that of a numerous body all were capable of assenting. Thus it has generally been found necessary to obtain a private act for the confirmation of such agreement; and where this has not been done, there are few cases indeed in which the new proprietors are not, within twenty years, liable to have their fences thrown down by some commoner omitted from or unbound by the instrument.

The new act gives no power to the inclosure commissioners to confirm such agreements.*

III. *By Act of Parliament.*—A private act of parliament, authorizing a commissioner to parcel out the waste in allotments, has been the ordinary agent of our modern inclosures. There are about four thousand of these acts, of which one half has been passed within the present century.†

Since the eight millions of common and commonable lands now uninclosed are to be subjected

* A clause to this effect was suggested to the Inclosure Committee (John Davies, 5314), and its omission would appear to be an imperfection in the Act. The Tithe Commissioners have an analogous power over invalid tithe composition agreements.

† Evidence of Wm. Blamire, Esq., before the Inclosure Committee; Report.

to a different process of inclosure, it forms no part of our present purpose to enter upon discussion as to the construction of these acts, the powers of the commissioners under them, or the provisions of the General Inclosure Act (41 Geo. 3, c. 109). Nor will it be necessary that we here set forth the provisions of the Common Fields Inclosure Act of the 6 & 7 W. 4, c. 115, commonly called Lord Worsley's Act.

It is obvious that in the working out of these four thousand acts of parliament, very numerous cases must occur in which the awards have not been in consonance with the powers given by the act, or have never been formally completed, or have not been completed within the time limited by the act, or in which, from some other defect in the proceedings, the title is legally unsound. This is practically found to be the case to a very considerable extent. The proceedings under Lord Worsley's Act have in many cases been informal, and the machinery of that statute has often been applied to lands which the Courts do not consider to be included within its sphere of operation.

The statute 8 & 9 Vict. c. 118, s. 152, enables the inclosure commissioners to amend any award made under a local act, or under the Common Fields Act, and to rectify any inaccuracy or confusion in such award. Sect. 157 gives them power to confirm any award improperly made under the supposed authority of the Common Fields Act,

and sections 153 and 154 enable the commissioners to revive powers under local inclosure acts lost by lapse of time or otherwise, and to appoint persons to complete the proceedings.

These powers are subject to restriction and reservation, for which the reader is referred to the act itself.

As future inclosures, however, will probably in nearly every instance be worked under this act; a few sentences may be advantageously devoted to a general sketch of its machinery.

Commoners desirous of inclosing must apply to the inclosure commissioners for a printed form of application. The owners of one third in value of the interests in the land fill this form up, and return it to the office. An assistant commissioner is then sent down, who inspects the land proposed to be inclosed, inquires into the correctness of the statements in the application, and holds a meeting to hear objections to the inclosure. The assistant commissioner, we will assume, reports to the Board that the inclosure should take place upon certain conditions, such as allotments for exercise or recreation, or for the labouring poor, or provisions for the protection of public rights or mineral property.

The commissioners upon this report make a provisional order, in which they set out the conditions, and also the proportion to be allotted to the lord, and state their intention either to au-

thorize the inclosure, or to certify in their annual general report the expediency of such inclosure.

If the lands be common lands; or commonable lands within fifteen miles of London, two miles of a town of 10,000 inhabitants, two-and-a-half miles of a town of 20,000, three miles of a town of 30,000, three-and-a-half miles of a town of 70,000, or four miles of a town of 100,000, then the commissioners will report the expediency of the inclosure to Parliament. If the proposed inclosure be of commonable and not common lands, and not within the distances above named, the commissioners may proceed without waiting for the special sanction of Parliament.

This provisional order will then be deposited in the parish, and a meeting will be held by an assistant commissioner, for the purpose of taking consents and dissents, and being satisfied that two thirds in value are consenting.

The commissioners will in one class of cases report, and wait for an act to enable them to proceed; and in the other class they will give notice of their intention to proceed with the inclosure.

As soon as the act is passed, or thirty days after the last-mentioned notice issued, the commissioners will call a meeting of persons interested in the land to be inclosed, to choose a valuer; and this meeting may give the valuer so chosen special instructions.

The valuer will then hold meetings to examine

claims, which must be delivered to him in writing. These will be deposited in the parish; and if objected to, the objection must be in writing, and delivered to the valuer, and served upon the person objected to. The claims will, at a subsequent meeting, be heard and determined by the valuer, subject to appeals to the commissioners, and thence to the courts of law.

The claims settled, the valuer allots, draws up a report and a map detailing his allotments, and deposits them for inspection.

An assistant commissioner holds an appeal meeting to hear objections to this report; and after such objections have been disposed of, the valuer, under the directions of the commissioners, draws up and signs his award, which, when confirmed by the commissioners, becomes a conclusive document.

Such is a general sketch of the course of proceedure under the Inclosure Commission Act. The chief discrepancy appears to be, the submitting the decision of all legal questions to functionaries without legal education. This necessarily gives rise to litigation or discontent. The most skilful measurer and valuer of land may possibly hold a different opinion upon a point of evidence, or the construction of a grant, to that which would obtain in the Court of Queen's Bench. If it was necessary to make the valuer of the land the expounder of the law, it had been wise to leave his legal dicta without appeal.

In practice, the commissioners usually send down an assessor (who, by sect. 35 of the act, must have been a barrister of five years' standing; but now, by a special amendment, this requisite is repealed) to sit with the valuer in all cases where legal discussion is likely to take place. But there is inconvenience in this. The decision is still in form only the decision of the valuer, and before an appeal can be made to the courts, a second trial must be had before an assistant commissioner. Strange to say, the act does not require that the assistant commissioner who tries the case by appeal from the decision of the assessor shall be a lawyer. The course adopted by the commissioners, however, is to appoint one of their legal assistants to sit as assessor; and then, in case the parties wish to take the case to the Courts, to appoint the same assistant commissioner to hear the appeal: in which case the second trial before a commission becomes a form. If a substantial re-hearing is asked, of course the commissioners appoint the same, or a different assistant commissioner, at their discretion.

IV. *By Encroachments.*—Wastes become inclosed by encroachments, illegal in their origin, but legalized after efflux of time by virtue of statutes of limitation.

After twenty years' adverse possession, the right of entry is gone, and the commoner has lost all means of enforcing his right.

In *Creach* v. *Wilmot*,* *Lee*, C. J., held, that in cases of inclosures there is no difference between the lord of the manor and a commoner. "The lord could not have brought an ejectment after twenty years' possession. Here the commoner, if he had any right, should have brought an assize of common, and not made an entry." A right of common is therefore barred by the Statute of Limitations.†

By the Inclosure Act upon which we are now commenting (sect. 50) it is enacted, that all encroachments made within twenty years shall be deemed parcel of the land to be allotted. Power, however, is given to the commissioners to allow the encroacher some limited estate in the land; and if they shall not see fit to do so, he may remove his materials.

Encroachments of twenty years' standing are, by sect. 52 of the same act, to be deemed old inclosures, but not so as to carry any right of common or allotment.

As to the property of encroachments, it was formerly held, that additions made to a farm from the waste became the property of the tenant making them; Lord *Kenyon*, in the case of *Doe d. Colcough* v. *Mulliner*,‡ saying, that "he re-

* 2 Taunt. 160, n.

† *Hawke* v. *Bacon*, 2 Taunt. 159. Recognised in *Tapley* v. *Wainwright*, 5 B. & Adol. 395.

‡ 1 Esp. 458.

volted at the idea that the tenant could make the landlord a trespasser, which would unavoidably be the case if the landlord could recover." His Lordship laid it down as clear law, that if a tenant inclosed part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord. This decision, however, does not seem to have been approved in subsequent cases; and in *Doe d. Lewis* v. *Rees*,* it was distinctly held, that if a tenant make an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly, from some act done at the time, that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. The same point was ruled the same way in *Doe d. Dunraven* v. *Williams*,† by Mr. Justice *Coleridge;* and it may now be considered as settled that every inclosure made by a tenant adjoining his farm is primâ facie presumed to be made by him for the benefit of his landlord. In the case of *Doe d. Lloyd* v. *Jones*,‡ *Alderson*, B., went so far as to call it a presumption of law, that a tenant making inclosures makes them for the benefit of his landlord.

* 6 Car. & P. 610. † 7 Car. & P. 332.
‡ L. J. R. 1847, Exch. 61.

CHAPTER VIII.

OF THE EVIDENCE IN CLAIMS BEFORE THE VALUER OR ASSISTANT COMMISSIONER.

In these inquiries it is often a question of great nicety, whether there is any lord of the manor entitled to his veto upon the inclosure, or to his allotment in lieu of rights and soil. In many instances manors have lost their manorial character by desuetude; the soil of the waste has been an unproductive property, and no care has been taken to perpetuate by occasional exercise a lord's expensive and unprofitable rights. Upon an inclosure, however, all these things become valuable, and the inclosure commissioners will have many claims brought before them in which there has been but little modern user.

The ordinary proof of the waste being subject to manorial rights will be the production of the Court Rolls. But where these exist in regular form there will probably be no dispute upon the question, manor or no manor.

Reputation alone is however primâ facie proof of the existence of a manor; and *Abbott*, L. C. J., observed, in *Steele* v. *Prickett*,* that a great num-

* 2 Stark. 467.

ber of manors rest upon no other evidence than reputation.

If a manor has formerly existed as a legal manor, but has since become only a reputed manor, any prescriptive right which it once had will still belong to it, though other manorial rights may be gone and severed from it. It is not necessary to prove it a continuing manor for all purposes.* Proof of a court held thirty-five years ago, with some instances of the appointment of gamekeepers, were held primâ facie to establish the title of the person claiming to be lord to eject an encroacher who had built upon the waste.†

An owner of the soil sufficiently answers the description of lord of the manor to take an allotment under an inclosure act, although the manor be to other purposes extinct.‡

It would appear from these cases, that where a documentary title to the manor can be made, very scanty exercise of the right will support a claim to allotment in lieu of soil.

Reputation of the existence of the manor, and documentary proof that the manor was conveyed to the claimant or his predecessors in title, should if possible be made the basis of the proof in favour of a disputed claim to a lord's allotments. Ap-

* *Soane* v. *Ireland*, 10 East, 261.
† *Doe d. Beck* v. *Heakin*, 6 A. & E. 498.
‡ *Smith* v. *Smith*, 2 Price, 101.

pointments of gamekeepers, cutting of timber, digging for minerals, holding of courts, and any similar acts of authority, will give great weight to the evidence of title; although, looking at the case of *Steele* v. *Prickett*,* where there was not the slightest vestige of the existence of any manorial right whatever, it is difficult to say that proof of the actual exercise of manorial rights is in all cases necessary to establish a claim to allotment in respect of them.

The inclosure commissioners have no power to try titles to manors as between adverse claimants. Their investigation of the lord's title will only be to ascertain whether the thing claimed—the lordship—exists, not to decide to whom it should belong.

Every claim made under the Inclosure Act to a right of common, must be stated in writing.† As the words of the claim will be followed by the valuer and the commissioner, and will, in case of further appeal, ultimately become the terms of the feigned issue, it is essential that such claim should be correctly worded, so as to show a legal right of common.

If it be intended to rely upon the provisions of the limitation clause of the Inclosure Commission Act, or of the statute 2 & 3 Will. 4, c. 71, the claim should be so laid; for it has been held

* 2 Stark. 467. † Sect. 47.

that the Limitation Act must be specially pleaded.*

It is at the option of the claimant whether he will rely upon his user, and rest his claim upon the limitation acts, or whether he will prove his custom, prescription, or grant, as at common law.

The enactments applicable to the former line of proof are as follow, and if they be relied upon, their requisitions must be strictly fulfilled. Stat. 2 & 3 Will. 4, c. 71, s. 1, after reciting that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," was, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed was sometimes defeated, by showing the commencement of such enjoyment, which was in many cases productive of inconvenience and injustice, enacts, "That no claim or grant to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of the king, his heirs or successors, or any land being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and such

* *Welcome* v. *Upton*, 5 M. & W. 398; 7 D. P. C. 475; *Reg.* v. *Westmark*, 2 M. & R. 305; *Lord Stamford* v. *Dunbar*, 16 L. J. R., N. S., C. P., 183.

things as are herein specially provided for, and except tithes, rents, and services, shall, where such profit, right, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption, for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years; but such claim may be defeated in any other way by which the same is now liable to be defeated: and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

In *Richards* v. *Fry*,* the Court of Queen's Bench held that the correct mode of pleading a thirty years' enjoyment was to follow the words in section 4, and allege a user for thirty years next before the commencement of the suit. Where therefore this statute is relied upon, the claims before the valuer should be made in this form; but the words "next before the commencement, &c.," will be construed to be exclusive of the time during which any disability may exist, if such

* 7 A. & E. 698.

disability should be relied upon by the objector, and notice given.*

By the seventh section, the time during which any disability exists, ex. gr., infancy, non compos mentis, coverture, or tenancy for life, or during which any action shall have been pending and diligently prosecuted, until abated by the death of any party thereto, may be excluded in the computation of the aforesaid periods, except only where the claim is declared to be absolute.

In the case of *Clayton* v. *Corby*,† decided under this section, there were two pleas, one stating the enjoyment of a right to dig clay for making bricks for sixty years, the other for thirty years. To the first plea the plaintiff replied, denying the enjoyment. To the second he replied, setting out that before the thirty years Sir W. Clayton was made tenant for life, and that he continued tenant for life during twenty-seven of the thirty years. The defendant rejoined, denying that the life estate continued during any part of the thirty years mentioned in the plea. The evidence showed an enjoyment for twenty-five years before the life estate, during its continuance, for six years after it, and up to the commencement of the action. It was held that the second plea was proved; and that, if the plaintiff chooses to reply and set up a tenancy for life, he excludes

* *Clayton* v. *Corby*, 3 Q. B. R.821.
† 3 Q. B. R. 827.

the time of that tenancy and drives the defendant to show thirty years' enjoyment, either wholly before the tenancy for life if it be still subsisting, or partly before and partly after if it be ended.

If there had been interruption during the tenancy for life, and the owner of the soil chooses to avail himself of that resistance, he may traverse the enjoyment as of right for thirty years and show the interruption. The claimant will not then be allowed to give the tenancy for life in evidence, in order to avoid the effect of the interruption.*

Unity of possession creates a cessation, although not an interruption, of the enjoyment as of right, and the period during which it has continued will be deducted from the period of enjoyment as of right which is required by the statute, and this without the fact being especially replied.†

By section 54 of the Inclosure Act it is provided, that where any claim shall be made to any right of common or other right which could not be sustained in law, but proof shall be made that enjoyment has been had under the right so claimed for sixty years or upwards, it shall be lawful for the valuer or commissioner to allow such claims in the same manner as if the right had been legally sustainable.

It would appear from this section to have been

* *Clayton* v. *Corby, ubi sup.*

† *Clay* v. *Shackeray*, 2 M. & Rob. 244; *Onley* v. *Gardiner*, 4 M. & W. 496.

the intention of the legislature to legitimize every user of sixty years, and to give every man a right to do upon a common what for sixty years he had done. Whether these words will avail to carry out this intention may, as I have before remarked, perhaps still be questioned.

In proving enjoyment under these acts, short intervals of desuetude will not be considered as interruptions of the user.

In construing the statute of Will. 4, it has been held that the words "without interruption" are not equivalent to "without intermission," for there must be an interval in the enjoyment of all such rights; and it must be a question for the jury in each case, whether the right was substantially enjoyed for the requisite period. Where actual enjoyment is shown before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time.*

In the same case "interruption" is defined by *Patteson*, J., as meaning "an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord;" and the same learned judge added, "How many times the right has been exercised is not the material question, if the jury are satisfied that the claimant exercised it as often as he chose. It is suggested that the argument for the plaintiff

* *Carr* v. *Foster*, 3 Q. B. R. 587.

might apply equally if there were a cesser for seven years. I am not prepared to say that it would not: it might be that, under the circumstances, the party had no occasion to use the right. The question would always be for the jury."

If the common-law line of proof be adopted, it will be often useful to be able to determine whether the right claimed is appendant or appurtenant.

The right may depend upon custom or upon prescription. The distinction between these two has been already sufficiently pointed out. This distinction, however, operates in a very important manner upon the evidence. To prove a custom, evidence of reputation is admissible; to prove a prescription, it is not.

Reputation and traditionary declarations must be supported by evidence of exercise of the right claimed. They must also be of a public nature, "because," said Lord *Kenyon* in *Weekes* v. *Sparke*,* "all mankind being interested in the subject, it is to be presumed that they will be conversant with and discourse together about it, which cannot apply to private prescription."† They must be also derived from persons likely to know the facts; must be general as to the whole custom, and not confined to particular places; and must have been made under such circumstances that no suspicion could exist that the minds of the speakers were biassed. Especially there must

* 1 M. & S. 679. † 14 East, 327, n.

have been no dispute pending as to the matter at the time of such declarations.*

The entry by homage on the court roll† is evidence to prove a custom within the manor, although there be no evidence of the exercise of that custom in any particular instance: for it is the solemn opinion of the homage, delivered upon oath, upon being convened to inquire into the point, and founded on all the information which tradition and personal observation can give them.‡

It is a general rule that acts done on one part of a waste may be given in evidence to show the usage on another part of the same waste.§

But the custom of one manor or district is not admissible to prove the existence of the same custom in another.‖

We have already seen, that it is not only necessary that the existence of the custom should be established by evidence, but also that the custom itself should be reasonable, certain, compulsory, and consistent.

The usual evidence, however, by which rights of common, whether customary or prescriptive, will be proved, will be that of usage; and "usage,

* B. N. P. 295.

† As to the admissibility and effect of entries on the ancient rolls of a manor, see *Doe d. Kinglake* v. *Beviss*, 18 L. J. R. 129, C. P.

‡ 5 T. R. 26.

§ *Bryan d. Child* v. *Winwood*, 1 Taunt. 208.

‖ 2 M. & S. 92.

though it be not ancient, which is admissible and unopposed by opposite evidence, is usually conclusive."* Acts of usage within the knowledge and experience of living witnesses are the most obvious proofs of the existence of the right claimed. Where, however, such usage has been scanty, recourse must be had to old individuals, ancient writings, and other depositories of reputation.

When the right claimed is for common appurtenant, ancient writings and parchments, containing grants of commonable rights, are often made available. They will be properly received in evidence if drawn from a proper custody. The proper custody is the custody of the person in whose hands the document would naturally or probably have been, provided it were what it purports to be. Documents brought from the British Museum, the Bodleian Library, and other public repositories, have often been refused by the Courts, in the absence of proof that they were originally deposited there by the parties to whom their custody naturally belonged.†

The extent of the right claimed must be measured by the capacity of the ancient inclosures in respect of which the right is claimed to winter commonable beasts, unless indeed the 54th section of the act of 8 & 9 Vict. c. 118, should be held

* *R.* v. *Hoyte*, 6 T. R. 430.
† *Swinnerton* v. *Marq. of Stafford*, 3 Taunt. 91.

to convert a practice of surcharging continued for sixty years into a right.*

In cases where rights of common in gross occur upon wastes whereon other commoners have rights limited by levancy and couchancy, it is submitted that the proper course of admeasurement will be, to take the total number of cattle that the old inclosures giving rights of common will winter, and adding thereunto the number conferred by the right in gross to allot proportionably. For in the numerous instances in which the waste is incapable of carrying the whole of the cattle which have rights upon it, it would be manifest injustice to allot to the commoner in gross a proportion sufficient to maintain his total number of cattle.

As to the competency of witnesses, the general rule was, that if the issue were on a customary right of common, by the establishment of which the witness would be benefited, he would be incompetent; but that when he gave evidence to establish the private prescription of another he was competent.† Thus, if the issue be on a right of common which depends on a custom pervading the whole manor, the evidence of the commoner, according to the old law, would have been inad-

* No case has yet been decided upon the construction of this section of the act; but (so far as my experience informs me) the assistant-commissioners have hitherto held that a right claimed under it must be a legaland a limited right.

† 1 T. R. 302; 3 T. R. 32; *Doe d. Pye* v. *Bramwell*, 3 Q. B. R. 309.

missible, because, as the right depends on the custom, the record in that action would be evidence in another action brought by that very witness to try the same right.* But the same reason does not apply where common is claimed by prescription, in right of a particular estate; for if A. has a prescriptive right of common belonging to his estate, it does not follow that B., who has also an estate on the same manor, has the same right: and the judgment for A. would not be evidence for B.†

Recent alterations in the law have, however, greatly decreased the importance of the learning as to witnesses' incompetency by reason of interest.

By the statute of 6 & 7 Vict. c. 85, commonly called Lord Denman's Act, it is enacted, "That no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law or by consent of parties authority to hear, receive, and examine evidence, but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in

* 1 T. R. 302. † Per *Buller*, J., 1 T. R. 303.

those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought and defended, either wholly or in part."

The evidence to rebut a claim of right of common will of course depend upon the counter claim to be set up.

Thus, if the lord or the owner of the soil claim an absolute property in himself, he may show that the land has been inclosed for twenty years,* or that he has done some act of approvement, leaving sufficient common for the commoners; or that there is a custom to erect houses on the waste, to the exclusion of the commoners, and that he has

* *Creach* v. *Wilmot*, 2 Taunt. 160; *Hawke* v. *Baron*, 2 Taunt. 156; *Tapley* v. *Wainwright*, 5 B. & Adol. 395.

acted on such custom; or that he has, with consent of the homage, and according to the custom of the manor, granted strips of land, being the land over which common is claimed, for the purposes of building; or that the waste has been inclosed under an Inclosure Act; or, in cases of claim of common for cause of vicinage,* that the lord of either waste has inclosed some part of his waste;† or that the claimant or those under whom he claims has released the whole or some part of his right of common.‡

For these purposes, the lord may show the customs he relies upon by old deeds and aged witnesses: he may prove from old grants, deeds, leases, &c., that he and his ancestors have dealt with the land as their own soil and freehold§ unencumbered by the right claimed: he may produce an examined copy of the Inclosure Act, and the award made in pursuance of it, where possession has not been had for twenty years, under the awards; or he may produce a release as to a por-

* Since the sheets in which the cases of *Jones* v. *Robin*, *Pritchard* v. *Powell*, and *Clarke* v. *Tinker*, were quoted, with references to the Law Journal Reports, passed through the press, the same cases have been reported, together with the case of *Jones* v. *Robin* (in error), in 10 Q. B. R. 581 to 640. But so far as the right of common, pur cause de vicinage, is concerned, the reports do not materially vary, and the judgment in error affirms the judgment of the court below. See ante, p. 26.

† *Harding* v. *Brooks*, 3 Keb. 24.

‡ *Rotherham* v. *Green*, Noy, Rep. 67.

§ *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.

tion of the land over which common is claimed.* Evidence that the cattle of a former tenant of the premises in respect of which the right is claimed have been impounded, will be material evidence to negative the right;† or if the claim be in respect of an ancient house, it will be a good answer to prove that the house was erected within twenty years, and not upon the site of a former house.‡ It may also be shown, under the 52nd sect. of the General Inclosure Act, that the land in respect of which the right is claimed was an encroachment upon the common.

Owners of common fields may also show a custom to inclose, which, as it is a custom affecting many, may be shown by reputation, from old deeds and writings, and by aged persons, or traditional declarations.§

We have seen that a right of common may be extinguished by unity of possession, and that, after such extinction, the right will not revive by a grant of the same land with common appurtenant, &c. It will be otherwise, however, if the claimant shall prove a grant of all commons *used* therewith.‖

It must be remembered, however, that where the claim has been made under the Limitation

* *Rotherham* v. *Green*, Noy, Rep. 67.
† 1 Esp. 459.
‡ *Dunstan* v. *Tresider*, 5 T. R. 2.
§ *How* v. *Strode*, 2 Wils. 269.
‖ 1 Taunt. 205; 3 Taunt. 24.

Act, no evidence proving the commencement of a prescriptive or customary right of common will be effectual after a user of thirty years, unless some disability shall have existed during a part or the whole of such thirty years; in which case, the period covered by the disability shall be excluded from the computation. Where the user has existed for sixty years, the right is absolute and indefeasible, unless it shall be proved that the user was had by some consent or agreement, expressly made or given for that purpose by deed or writing.*

Where it is intended to rely upon any circumstance excepting the case from the operation of the Limitation Act, notice of the point so relied upon must be given to the party so claiming.

* Stat. 2 & 3 W. 4, c. 71, ss. 1, 7.

CHAPTER IX.

OF THE JURISDICTION OF THE INCLOSURE COMMISSIONERS IN MATTERS FOREIGN TO THE INCLOSURE OF COMMONS.

SECT. I. *Exchanges.*—II. *Partition.*—III. *Division of Intermixed Lands.*—IV. *Drainage Rent-Charges.*

THE Inclosure Commission, beyond its jurisdiction over waste lands, has very extensive powers to carry out exchanges, and partitions of lands not subject to be inclosed, nor in any way connected with the objects of inclosure. These powers, as they become more known, are more constantly called into exercise; and they are of no small benefit to landowners, since by their aid any two can, at very trifling expense, correct any irregularity in the boundary of their respective estates, or even exchange entire estates.

SECTION I.

Exchanges.

The difficulties in effecting exchanges of lands were always great and very often insurmountable. The expense of the investigation of two titles was usually sufficient to deter parties from ex-

changing small angular pieces running into each other's estates; even if it happened, what rarely does happen, that the two contiguous estates were in hands which had full power to convey them. This may, however, now be done without any risk or investigation of title, and with scarcely any expense, by the simple process of attaching to the lands exchanged all the accidents of title, tenure, and incumbrance which formerly belonged to each other. The only questions requiring the decision of the commissioners are: Is the exchange beneficial to the two estates? Are the parcels proposed to be exchanged equal in value? When satisfied of this (either by their own inquiry or by a valuation from some valuer, in whose judgment and integrity the commissioners have confidence) the commission authorizes the exchange, and the one parcel immediately, for all purposes, takes the place of the other. So that if the title of either be thereafter found faulty, the person who may recover will have not the piece of land with the faulty title, but the piece which the commissioners had put in its place, and clothed with all its liabilities.

The first enactment conferring these powers is sect. 147 of the original Inclosure Act, 8 & 9 Vict. c. 118, which provides that any persons, who are interested in lands to the extent mentioned in the 16th sect. of that Act, and who desire to effect an exchange of lands, may apply in writing to the Inclosure Commissioners; that the commissioners

shall direct inquiries whether the proposed exchange would be beneficial, and whether the terms are just; that if the commissioners are of opinion that the exchange would be beneficial, and that the terms are just, they shall frame and confirm an order of exchange, with a map of the lands given and taken in exchange.

Sects. 150 and 151 provide that certain notices shall be given; that the order of exchange shall not be confirmed until three months after the notice; and that if any person, entitled to any estate in or charge upon either of the lands proposed to be exchanged, gives the commissioners notice of his dissent, the commissioners shall not confirm the order while the dissent continues. The commissioners have power to give a certificate for expenses, upon which certificate two justices will issue a distress warrant.

As these provisions did not extend to make the lands exchange their tenures as well as their titles and liabilities, copyhold and customary lands were excluded from the benefit of the commissioners' jurisdiction. The first Amendment Act, 9 & 10 Vict. c. 70, sect. 9, rectifies this omission, requiring however the consent of the lord of the manor; and the same Act, sect. 11, gives the commissioners power to exchange any undivided share in any land, or any cattle-gate or other gate, or any right of common defined by numbers or stints.

The second Amendment Act, 11 & 12 Vict. c.

112, enables the commissioners, with the consent of the lord and of the parties, to enfranchise copyhold and customary lands by their order of exchange, and to declare that the same shall be held as of freehold tenure.

The same Amendment Act empowers the commissioners to reserve the right to minerals in the land exchanged.

The fourth Amendment Act, 12 & 13 Vict. c. 83, s. 11, provides, that persons interested in several subject-matters of exchange, held under separate titles, or subject to separate charges, may effect exchanges of those subject-matters.

The 7th sect. extends all the provisions relating to exchanges, to all rights of common, rights of fishing, manorial and other rights, and all easements over any land; and all quit rents, chief rents, tithes, and rent-charges; and, which is a very important extension, enables the commissioners to exchange all these, not only for other rights or easements of a similar nature, but for any rights whether of a like or different nature, *or for land.*

Thus the powers of the commission have been from time to time extended to comprise all the cases omitted from the contemplation of the original statute. Land, and all things of the nature of land, may now be exchanged as freely and as easily as a piece of merchandise.

It must be remembered, however, that the

powers of the commission are limited to the exchanging parcels of equal value. They cannot authorize any exchange wherein an inadequacy in the value of one of the parcels is made up by a money payment.

A form of the order of exchange is printed in the Appendix.

SECTION II.

Partition.

Parceners, writes Littleton,* are of two sorts; to wit, parceners according to the course of the common law, and parceners according to the custom. Parceners after the course of the common law are where a man or woman, seised of certain lands or tenements in fee simple or in tail, hath no issue but daughters and dieth, and the tenements descend to the issue, and the daughters enter into the lands or tenements so descended to them; then they are called parceners, and be but one heir to their ancestor. And they are called parceners, because, by the writ which is called breve de participatione faciendâ, the law will constrain them that partition shall be made among them.

Lord Coke, in his commentary upon this section, enumerates several inheritances that shall not be divided between coparceners. Reasonable

* Sect. 241.

estovers appendant to a freehold are so entire, that they shall not be divided between coparceners. So also are homage and fealty, a piscary uncertain, or a common sans nombre; for that would be a charge to the tenant of the soil.*

Partition, however, is not confined to those who come within Littleton's definition: it is of common right between parceners, joint-tenants, and tenants in common. But it could not be compelled, except between parceners, before the statutes 31 H. 8, c. 1, s. 2, and 32 H. 8, c. 32, s. 1.

The process of partition at law was found so difficult, inasmuch as the plaintiff must prove his title as he declares, and also the titles of the defendants, and judgment is given for partition according to the respective titles so proved, that the Courts of Equity interfered as early as the time of Elizabeth, and granted relief by issuing a commission of partition. And it has been said that a decree for a partition is a matter of right, and that there is no instance of not succeeding in it, but where no proof is adduced of title in the plaintiff.†

Whatever is capable of division may be the subject of partition. But partition in equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute the conveyances, the partition cannot be effectuated. If, therefore, the defendants in

* Co. Lit. 164 *b*. † *Parker* v. *Gerard*, Amb. 236, 1 V. & B. 554.

a suit for partition be infants cestuis que trust, the conveyance is respited until they attain twenty-one.

Not only lands are subject to partition, manors with every right of the lord, and even the waste, may be divided. In one case the property, which was situated in the north of England, consisted of cattle-gates, and of certain other rights of very peculiar nature; and a partition was decreed in very minute fractions, according to the rights of the cattle-gates.

A power of sale, or a power of exchange, does not, it seems, warrant a partition.

On a partition every part of the estate need not be divided. If there be three houses, it would not be right to divide every house, for that would be to spoil them; but some recompense is to be made, either by a sum of money, or rent for owelty of partition, to those who have the houses of least value, as it was in the civil law. If, however, there be but one house, there may be a decree for the partition of the same, though highly inconvenient; and when exceptions were taken to the report of the commissioners for the partition of a house among joint-tenants, one party complaining that she could not get to her division except up stairs, which stairs were allotted to another person, the Chancellor would not interfere; and where the bill was for a partition of a cold bath, it was decreed.

So it is if there be but one mill or an advowson to be divided; but it is different where there are other lands which make up the share. A partition was decreed between tenants in common of a waste, though great inconvenience might ensue, as the want of pasture, shade, &c.

It is no objection to a partition that other persons may come in esse and be entitled; otherwise, in every case where there is a settled estate with remainders to persons who may come in esse, there never could be a partition.

An infant tenant in common, or joint-tenant, may file a bill for a partition; or such bill may be filed against him, and it will be decreed; but the conveyance will be respited until the infant is of age. If a contingent remainder, not capable of being barred or destroyed, is limited to a person not in being, the conveyance must be delayed until such person shall come in being, or until the contingency shall be determined; in either case a supplemental bill would be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment.

A bill for a partition may be sustained on behalf of a joint-tenant of a lease for years; nor, in such case, is the reversioner a necessary party. And a bill for a partition of tithes will lie, but the Court has no jurisdiction to grant a commission of partition between tenants in common of a copyhold; the statutes relative to partition not

applying to copyholds. It is the same as to joint-tenants of a copyhold, and also as to parceners; and, on the same ground, an agreement to divide copyhold lands will not operate as a partition, nor can be enforced, it being without the lord's privity.*

By the 41 G. 3, c. 109, s. 16, it is enacted, that it shall be lawful for the commissioners in Inclosure Acts, upon the request in writing of any joint-tenant, coparceners, or tenants in common, or any or either of them; or of the husbands, guardians, committees, or attorneys of such as are under coverture, minors, lunatics, or under any other incapacity, or absent beyond sea; to make partition and division of the estates and allotments to such of the said owners or proprietors who shall be entitled to the same as joint-tenants, coparceners, or tenants in common; and to allot the same accordingly in severalty.

The Act 8 & 9 Vict. c. 118, contained a similar provision, but the jurisdiction was confined to cases where the lands were lands to be inclosed under the authority of that Act.

By the Amendment Act, 11 & 12 Vict. c. 99, s. 13, it is recited, that it is expedient that the provisions of all the Inclosure Commission Acts shall extend to partition, and enacted, that upon the application in writing of the persons interested, according to the definition contained in s. 16 of the original Act, in the several undivided parts or

* 1 Mad. Ch. Prac. 326.

shares of any land not subject to be inclosed, the commissioners may frame and confirm an order of partition; and the allotments shall bear the title and liabilities which the undivided shares bore before the partition.

The same section of the subsequent Amendment Act (12 & 13 Vict. c. 83, s. 7), which extends the power of exchanging to incorporeal rights, gives an equal extension to the power of partition.

It will be seen, therefore, that the jurisdiction of the commission, in cases of partition, is in some respects more ample than that exercised by the Court of Chancery; since the commission can perfect a partition while the parties are under disabilities, or where the lands to be divided are copyholds—subject, however, to the proviso in case of dissent of any party interested.

The commission, however, has no compulsory power. The commissioners can only inquire whether a proposed partition would be beneficial and just; and if they think the partition proposed beneficial, just, and equal in value, they may give it validity: they have no power to make a division not consented to by all parties interested.

It will probably be considered that these Acts give no powers to the commission to divide things not previously divisible at common law or by statute.

shall direct inquiries whether the proposed exchange would be beneficial, and whether the terms are just; that if the commissioners are of opinion that the exchange would be beneficial, and that the terms are just, they shall frame and confirm an order of exchange, with a map of the lands given and taken in exchange.

Sects. 150 and 151 provide that certain notices shall be given; that the order of exchange shall not be confirmed until three months after the notice; and that if any person, entitled to any estate in or charge upon either of the lands proposed to be exchanged, gives the commissioners notice of his dissent, the commissioners shall not confirm the order while the dissent continues. The commissioners have power to give a certificate for expenses, upon which certificate two justices will issue a distress warrant.

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A bill for a partition may be sustained on behalf of a joint-tenant of a lease for years; nor, in such case, is the reversioner a necessary party. And a bill for a partition of tithes will lie, but the Court has no jurisdiction to grant a commission of partition between tenants in common of a copyhold; the statutes relative to partition not

applying to copyholds. It is the same as to joint-tenants of a copyhold, and also as to parceners; and, on the same ground, an agreement to divide copyhold lands will not operate as a partition, nor can be enforced, it being without the lord's privity.*

By the 41 G. 3, c. 109, s. 16, it is enacted, that it shall be lawful for the commissioners in Inclosure Acts, upon the request in writing of any joint-tenant, coparceners, or tenants in common, or any or either of them; or of the husbands, guardians, committees, or attorneys of such as are under coverture, minors, lunatics, or under any other incapacity, or absent beyond sea; to make partition and division of the estates and allotments to such of the said owners or proprietors who shall be entitled to the same as joint-tenants, coparceners, or tenants in common; and to allot the same accordingly in severalty.

The Act 8 & 9 Vict. c. 118, contained a similar provision, but the jurisdiction was confined to cases where the lands were lands to be inclosed under the authority of that Act.

By the Amendment Act, 11 & 12 Vict. c. 99, s. 13, it is recited, that it is expedient that the provisions of all the Inclosure Commission Acts shall extend to partition, and enacted, that upon the application in writing of the persons interested, according to the definition contained in s. 16 of the original Act, in the several undivided parts or

* 1 Mad. Ch. Prac. 326.

shares of any land not subject to be inclosed, the commissioners may frame and confirm an order of partition; and the allotments shall bear the title and liabilities which the undivided shares bore before the partition.

The same section of the subsequent Amendment Act (12 & 13 Vict. c. 83, s. 7), which extends the power of exchanging to incorporeal rights, gives an equal extension to the power of partition.

It will be seen, therefore, that the jurisdiction of the commission, in cases of partition, is in some respects more ample than that exercised by the Court of Chancery; since the commission can perfect a partition while the parties are under disabilities, or where the lands to be divided are copyholds—subject, however, to the proviso in case of dissent of any party interested.

The commission, however, has no compulsory power. The commissioners can only inquire whether a proposed partition would be beneficial and just; and if they think the partition proposed beneficial, just, and equal in value, they may give it validity: they have no power to make a division not consented to by all parties interested.

It will probably be considered that these Acts give no powers to the commission to divide things not previously divisible at common law or by statute.

SECTION III.

Division of Intermixed Lands not subject to be Inclosed.

By s. 148 of the original Act, the commission received power to confirm a re-division of any intermixed lands, where the original parcels were so intermixed or inconvenient, in form or quantity, that they could not be cultivated or occupied to the best advantage. The proceeding in this is the same as in the cases of exchange and partition; an order of division, with a map annexed, is framed and confirmed, upon the application of the parties after the specified notices have been given, and no dissents lodged.

The Amendment Act, 9 & 10 Vict. c. 70, s. 6, very much extends this power. By this Act the commissioners received power (upon request of the parties interested) to appoint an assistant-commissioner to set out the boundaries of intermixed copyhold and freehold lands, or intermixed copyholds of different manors, or intermixed leaseholds for life or years, where the same have been held or occupied together and cannot be identified. In this case the assistant-commissioner makes an award, which is subject to all the provisions applicable to an order of exchange.*

* There are some few instances in which arable land is found with all the incidents of a common field, except that there is no right of intercommoning to eat the herbage. Such a case was recently brought before the commissioners

The Inclosure Commission has hitherto issued no form of award for this purpose: but the form of the order of exchange is usually adopted and altered to meet the circumstances of the case.

SECTION IV.

Drainage Rent-Charge.

By the Act 9 & 10 Vict. c. 101, the Inclosure Commission were entrusted with the distribution of two millions, authorized by the Act to be lent by the Treasury out of the Consolidated Fund, to landowners in England and Scotland for the purposes of drainage.

This money was very soon exhausted, and the unsuccessful applicants being numerous, and the policy of the Act being found beneficial, Parliament, in the last session, conferred general powers of borrowing money for purposes of drainage upon persons having but a limited estate.

By the "Private Money Drainage Act" (12 & 13 Vict. c. 100) the Inclosure Commissioners are constituted the commissioners to exercise the powers by which owners of lands are authorized to borrow or advance money to be expended in draining such lands.

By this Act, after application made, notices

from a parish in Cambridgeshire. These lands must be divided as intermixed, and not inclosed as commonable lands.

given, and inspection of the land by the officer of the commission, any person in the actual possession or receipt of the rents or profits of any lands (except any tenant for life or lives, or for years holding under a lease or agreement for a lease on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof)* may borrow or advance money for drainage, and charge the same on the inheritance. Upon the commissioners being satisfied of the due execution of the work, they grant a rent-charge for twenty-two years, indefeasible in title, and chargeable upon the land prior to all other charges, except tithe rent-charges, chief rents, and taxes.

This is a jurisdiction so foreign to the original purpose of the commission, and to the scope of this work, that I have done little more than allude to its existence; nor have I thought it necessary to encumber my book with a reprint of the Act. Like any other provision which might have the effect of allowing landowners with limited estates to let their lands upon equitable terms, or to improve their cultivation, it must doubtless be very beneficial in its operation, and it is well that the power should be known to exist.

* See stat. 6 & 7 W. 4, c. 71, s. 12.

The Act for the Inclosure of Wastes.

8 & 9 VICTORIÆ REGINÆ.

CAP. CXVIII.

*An Act to facilitate the inclosure and improvement of commons and lands held in common, the exchange of lands, and the division of intermixed lands; to provide remedies for defective or incomplete executions, and for the non-execution of the powers of general and local Inclosure Acts; and to provide for the revival of such powers in certain cases.** [8*th August*, 1845.]

Appointment and Removal of Commissioners.

WHEREAS it is expedient to facilitate the inclosure and improvement of commons and other

* It will be seen from the title to this Act that its provisions have four grand divisions:—

First, The inclosure and improvement of wastes.

Secondly, The exchange of lands.

Thirdly, The division of intermixed lands.

Fourthly, The rectification of inclosures imperfectly made under local or general Inclosure Acts.

It is now nearly half a century since the objects effected by this Act have been contemplated by the legis-

lands now subject to rights of property which obstruct cultivation and the productive employment of labour, and to facilitate such exchanges of lands, and such divisions of lands intermixed or divided into inconvenient parcels as may be beneficial to the respective owners; and it is also expedient to provide remedies for the defective or incomplete execution and for the non-execution of powers created by general and local Acts of Inclosure, and to authorize the revival of such powers in certain cases: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for one of her Majesty's principal Secretaries of State to appoint any two fit persons to be commissioners under this Act, and at pleasure to remove the commissioners so appointed, or either of them; and upon every vacancy in the office of such commissioner some other fit person shall be appointed to such office in like manner; and the commissioners so to be appointed shall, with the first com-

Appointment of Commissioners.

lature. In the year 1801 a committee of the House of Commons sat upon the subject, and they went so far as to prepare the draft of a bill. Their measure was, however, upon examination, found to be quite impracticable. A comparison of that draft with the present Act strongly exhibits the difficulties that were to be surmounted and that have been surmounted in the completion of this elaborate measure.

missioner of her Majesty's woods, forests, land revenues, works, and buildings, for the time being, be the commissioners for carrying this Act into execution; and during any vacancy in the office of commissioner under this Act it shall be lawful for the continuing commissioners or commissioner to act as if no such vacancy had occurred.*

Chairman of Commissioners.

II. And be it enacted, that the said first commissioner of her Majesty's woods, forests, land revenues, works, and buildings for the time being shall be the chairman of the commissioners acting in the execution of this Act; and such commissioners shall be styled "The Inclosure Commissioners for *England* and *Wales*," and shall have their office in *London* or *Westminster*, and they, or any two of them, may sit from time to time, as they deem expedient, as a board of commissioners for carrying this Act into execution; and the commissioners shall cause to be made a seal of the said board, and shall cause to be sealed therewith all awards and orders made or confirmed by the commissioners in pursuance of this Act; and

Style of Commissioners.

To have a common seal.

* The commissioners under the act are, The Right Honourable the Earl of Carlisle (ex officio chairman, as First Commissioner of the Woods and Forests, by virtue of the 2nd sect.), W. Blamire, Esq., and George Darby, Esq. Henry Charles Mules, Esq., is the secretary to the commission, and the office is at 5, New Street, Spring Gardens.

all such awards and orders and other instruments proceeding from the said board, or copies thereof, purporting to be sealed with the seal of the said board, shall be received in evidence, without any further proof thereof; and no award or order of the commissioners under the authority of this Act shall be of any force unless the same shall be sealed as aforesaid.

Yearly Reports to be made.

Commissioners to make annual reports:

III. And be it enacted, that the commissioners shall from time to time give to any one of her Majesty's principal Secretaries of State such information respecting their proceedings as such principal Secretary of State shall require, and shall in the month of *January* in every year send to one of the principal Secretaries of State a general report of their proceedings, specifying the applications which may have been made to them under the provisions of this Act, and the several cases in which they shall have authorized inclosures, and the grounds on which they may have withheld their consent to such application, and also the cases in which they shall be of opinion that proposed inclosures, which may not be made without the direction of Parliament, would be expedient; and such report shall separately distinguish all such proposed inclosures as relate to lands situate within fifteen miles of

the city of *London*, and within such respective distances of other cities or towns as hereinafter mentioned, and shall state in each such case the special grounds on which they shall be of opinion that such inclosure shall be expedient; and as well in the cases in which they shall have authorized inclosures as in the other cases aforesaid such report shall state the extent of the land authorized and proposed to be inclosed, with such other particulars as hereinafter directed; and such report shall also specify the progress which shall have been made in inclosures which the commissioners may have authorized, and in the inclosures which Parliament may have directed to be proceeded with; and every such report shall be laid before both Houses of Parliament within six weeks after the receipt of the same by such principal Secretary of State, if Parliament be sitting, or if Parliament be not sitting, then within six weeks after the next meeting of Parliament; and such commissioners may from time to time send to one of the principal Secretaries of State such special reports in relation to all or any of the matters aforesaid as they may think fit.*

and also special reports.

* This provision was introduced to enable the commissioners to bring within the provisions of the general bill applications made subsequently to their general report, which must be made in the month of January. In practice this has been found very beneficial. It is desirable in the inclosure of common field lands to perfect the inclosure rapidly, otherwise every severalty holder will exhaust his land before it falls into hotchpot.

Commissioners to appoint Assistant-Commissioners and Officers.

Power to appoint and remove assistant-commissioners, &c.

IV. And be it enacted, that it shall be lawful for the commissioners from time to time to appoint a sufficient number of persons to be assistant-commissioners, and also a secretary, and such clerks, messengers and officers as they shall deem necessary, and to remove such assistant-commissioners, secretary, clerks, messengers, and officers, or any of them, and on any vacancy in any of the said offices to appoint some other person to the vacant office; and the persons so appointed shall assist in carrying this act into execution at such places and in such manner as the commissioners may direct: provided always, that no such appointment shall be made by the commissioners unless the Lord High Treasurer or any three or more of the commissioners of her Majesty's treasury shall in the case of each such appointment consent thereto.

Limitation of Appointments under the Act.

Appointments under this act limited to five years.

V. And be it enacted, that no commissioner or assistant-commissioner, secretary, or other officer or person so to be appointed, shall hold his office for a longer period than five years next after the day of the passing of this Act, and thenceforth until the end of the then next session of Parliament; and after the expiration of the said period of five years and of the then

next session of Parliament so much of this Act as authorizes any such appointment shall cease.

Amount of Salaries of Commissioners and Officers.

VI. And be it enacted, that it shall be lawful for the Lord High Treasurer or Commissioners of her Majesty's treasury to direct a salary, not exceeding one thousand five hundred pounds by the year, to be paid to* one of the commissioners for the time being appointed under this Act; but, except as aforesaid, no salaries shall be paid to the commissioners in respect of their appointments under this Act; and the allowances to the assistant-commissioners, and the salaries of the secretary, clerks, messengers, and other officers to be appointed under this Act, shall be from time to time regulated by the Lord High Treasurer, or the Commissioners of her Majesty's treasury, or any three of them: provided always, that the allowance to an assistant-commissioner shall not exceed the sum of three pounds three shillings for every day he shall be actually employed or travelling in the performance of the duties of his office; provided also, that the said Lord High Treasurer or Commissioners may allow to any commissioner, assistant-commissioner, secretary, clerk, mes- Salaries and allowances.

* George Darby, Esq., is the paid commissioner under this section.

senger, or other officer such reasonable travelling and other expenses as may be incurred by him in the performance of his duties under this Act, in addition to his salary or allowance (if any) respectively.

Payment of Salaries, &c.

Allowances and salaries to be paid out of the consolidated fund.

VII. And be it enacted, that the allowances and salaries of such commissioner, assistant-commissioners, secretary, clerks, messengers, and officers as aforesaid, and all other incidental expenses of carrying this Act into execution not herein otherwise provided for, shall be paid by the Lord High Treasurer or the Commissioners of her Majesty's treasury out of the consolidated fund of the United Kingdom of *Great Britain* and *Ireland*.

Declaration to be made by Commissioners.

Commissioners and assistant-commissioners to make a declaration.

VIII. And be it enacted, that every commissioner shall before he shall enter upon the execution of his office make the following declaration before one of the judges of her Majesty's Court of Queen's Bench or Common Pleas, or one of the barons of the Court of Exchequer; (that is to say,)

'I do solemnly declare, that I 'will faithfully, impartially, and honestly, ac- 'cording to the best of my skill and judgment, 'execute the powers and duties of a commis- 'sioner under an act passed in the year

'of the reign of Queen *Victoria*, intituled [*here 'set forth the title of this Act*].'

And every assistant-commissioner shall, before he shall enter upon the execution of his office, make the like declaration (substituting the words "assistant-commissioner" for the word "commissioner") before such judge or baron, or before any two justices of the peace for the county, riding, division, liberty, or jurisdiction wherein such assistant-commissioner shall be resident at the time of his appointment, or before a master extraordinary in her Majesty's High Court of Chancery; and the appointment of every such commissioner and assistant-commissioner, with the time when and the name or names of the judge, baron, justices, or master extraordinary before whom he shall have made the declaration aforesaid, shall be forthwith published in the *London Gazette*.

Examination of Witnesses and Production of Documents.

Documents of the tithe commissioners may be used.

IX. And be it enacted, that all awards, apportionments, agreements, writings, and maps in the custody of the tithe commissioners for *England* and *Wales* shall be open to the use and inspection of the inclosure commissioners for *England* and *Wales*, or any person by them authorized; and such copies of or extracts

from such awards, apportionments, agreements, writings, and maps as the commissioners shall require shall be furnished to them for the purposes of this Act; and that the commissioners or any assistant-commissioner may, by summons under the seal of the commission or under the hands of such assistant-commissioner, require the attendance of all such persons as they or he may think fit to examine upon any matter relating to any inclosure or proposed inclosure, or other proceeding under the authority of this Act, and also make any inquiries and call for any answer or return as to any such matter, and also administer or receive declarations, and examine all such persons upon declaration, and cause to be produced before them or him, upon declaration, all court rolls, and all rate books, instruments of tithe apportionment, and other public writings, maps, plans, and surveys of or belonging to any parish, or copies thereof respectively, in anywise relating to any such matter; and the commissioners may, whe they shall think fit, by summons under the seal of the commission require the attendance before any valuer acting in the matter of an inclosure under this Act of all such persons as the valuer may certify to the commissioners as persons whose testimony may be necessary for the matter of such inclosure, and cause to be produced before such valuer, upon declara-

Power to summon witnesses.

tion, all such court rolls,* rate books, public writings,† maps, plans, and surveys, or copies

* In order to prove the title of a copyholder, the court rolls may be produced, or copies of them may be given in evidence, *Doe* v. *Hale*, 16 East, 208, the handwriting of the steward being proved; but where an admittance is more than thirty years old, proof of the signature of the steward is unnecessary. *Dean and Chapter of Ely* v. *Stewart*, 2 Atk. 45; but see *Duke of Somerset* v. *Franco*, Fortescue, 43. In one case *Holt*, C. J., ruled that the rough draught of the steward of the manor was good evidence. Anon. 1 Ld. Raymond, 735; 6 B. & C. 495.

And it has been held, that a surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor; and the parol testimony of the foreman of the homage jury who made such presentment. *Doe* v. *Calloway*, 6 B. & C. 484.

† As to the effect of court rolls, whether they be of the court baron or customary court, they are evidence between the lord of the manor and his tenants or copyholders, B. & P. 247; 1 Phil. Ev. 397; and ancient writings not properly court rolls, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made assensu omnium tenentium, have been admitted as evidence to prove the course of descent of lands in the manor. *Denn* v. *Spray*, 1 T. R. 466. So, an entry on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe* v. *Parker*, 5 T. R. 26; and see *Doe* v. *Askew*, 10 East, 520. Parchment writings preserved among the muniments of a manor, dated 1698 and 1717, purporting to be signed by certain copyholders of the manor, stating an unlimited right of common in the copyholders, have been held to be evidence of the reputation of the manor at the time as to a prescriptive right of common set up by the defendant. *Chapman* v. *Cowlan*, 13 East, 10. Presentments are not evidence of matters not within the jurisdiction of the homage. *Richards* v. *Bassel*, 10 B. & C. 657. Entries in the

thereof, as aforesaid; and every valuer acting

books of the clerk of the peace of deputations many years since granted to gamekeepers by the owner of a manor are evidence to show that the party there mentioned exercised the right of appointing gamekeepers, by applying to the clerk of the peace to get certificates, without production of the deputations themselves. *Hunt* v. *Andrews*, 3 B. & A. 341; *Rushworth* v. *Craven*, 1 M'C. & Y. 417.

Corporation books are allowed to be given in evidence when they have been publicly kept as such, and when the entries have been made by the proper officer, *R.* v. *Mothersele*, 1 Stra. 92. A book kept by a prosecutor's clerk, who was not an officer of the corporation, containing minutes of corporate proceedings, but which had not been kept as the public book of the corporation, was rejected in evidence. Ibid. If the books are ancient, it must be shown that they come from the proper custody of the clerk, as from a chest that has always been in the custody of the clerk of the corporation, *Mercers of Shrewsbury* v. *Hart*, 1 Car. & P. 114; it is not sufficient if they are brought from a chest found in the house of a former clerk after his death. Ibid.

An old terrier or survey is not in general admissible in evidence without proof of its having come from the proper repository, 1 Stark. Ev. 170. So an old grant to an abbey contained in a manuscript, entitled "Secretum Abbatis," in the Bodleian Library, was rejected, as not coming from the proper repository, *Michael* v. *Rabbetts*, cited 3 Taunt. 91. So an ancient grant to a priory, from the Cottenham Manuscripts in the British Museum, was rejected, it not appearing that the possession of the grant was connected with any person having an interest in the estate; *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91.

On an issue to try the boundaries of two parishes, an old terrier or map of the limits drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, it not being signed by any person bearing a public character or office in the parish, *Earl* v. *Lewis*, 4 Esp. 3.

in the matter of an inclosure under this Act may also administer or receive declarations, and examine upon declaration* all such per-

* The declaration may be in the following form:—
"I, A. B., do solemnly declare that the evidence I shall give before you, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth."

By the 144th sect. any person giving false evidence, or withholding or destroying any document, or refusing to attend or give evidence, shall be deemed guilty of a misdemeanor.

The summons should be personally served, and may be in the following form:—

"To A. B. of , in the county of .
I, A. B., one of the assistant-commissioners acting in the execution of an act passed in a session of parliament held in the 8th and 9th years of the reign of her present Majesty, entitled 'An Act to facilitate the inclosure and improvement of commons and lands held in common, the exchange of lands and division of intermixed lands; to provide remedies for defective or incomplete executions, and for the non-execution of the powers of general and local Inclosure Acts; and to provide for the revival of such powers in certain cases;' do hereby, by virtue of the powers by the said act conferred, require you personally to be and appear before me at , in the county of , on , the day of , at the hour of in the noon of the same day, then to be examined and to testify all those matters and things which you shall know of, and concerning all matters pertaining to the common of [*describe the land to be inclosed*], or to the rights of the commoners or the lord, or to the expediency of the inclosure thereof [*vary this language to meet the circumstances of the case*], and I hereby also require you to produce, or cause to be produced, before me at the time and place last appointed [*describe the particular document the production of which is required*]; and herein fail not, as you will be liable to be indicted for a misdemeanour.

"Witness my hand this day of 184 ."
(Signature of Assistant-Commissioner.)

This summons must be served a reasonable time before

sons as shall attend before him under such summons of the commissioners, and all such persons as may voluntarily attend before him as witnesses in such matter: provided always, that no such person shall be required to attend in obedience to any such summons unless the reasonable charges of his attendance shall have been paid or tendered to him; and no such person shall be required in any case, in obedience to any such summons, to travel more than ten miles from the place of his abode.

Delegation of Powers to Assistant-Commissioners.

Commissioners may delegate powers to assistant-commissioners.

X. And be it enacted, that the commissioners may delegate to the assistant-commissioners, or to any one or more of them, such of the powers hereby given to the commissioners as the commissioners shall think fit (except the power to confirm awards, or to do any act herein required to be done under the seal of

the meeting; and if the production of documents be required, time must be allowed to enable the party to make effectual search. Chit. Sum. Prac. 178.

A witness served with this summons, duces tecum, must be ready to produce the writings in his possession, if ordered, *Amy* v. *Long*, 9 East, 473; but if the production would have a tendency to subject him to a criminal charge, or to a penalty or forfeiture, a judge — and therefore an assistant-commissioner or valuer — will excuse the non-production. See *Whitaker* v. *Izod*, 2 Taunt. 115. So, if he state that they are his title-deeds, judges have always refused to compel him to produce them. Per Cur. *Pickering* v. *Noyes*, 1 B. & C. 263; and see *R.* v. *Upper Boddington*, 3 D. & R. 726.

the commissioners), and the power so delegated shall be exercised under such regulations as the commissioners shall direct; and the commissioners may at any time recall or alter all or any of the powers delegated as aforesaid, and, notwithstanding the delegation thereof, may act as if no such delegation had been made; and all acts done by any such assistant-commissioner in pursuance of such delegated power shall be obeyed by all persons as if they had proceeded from the commissioners, and the non-observance thereof shall be punishable in like manner.

*What Lands are subject to be inclosed under this Act.**

Descriptions of land subject to be inclosed under this act.

XI. And be it enacted, that all such lands as are hereinafter mentioned; (that is to say,) all lands subject to any rights of common whatsoever, and whether such rights may be exercised or enjoyed at all times, or may be exercised or enjoyed only during limited times, seasons, or periods, or be subject to any suspension or restriction whatsoever in respect of the time of the enjoyment thereof;

* This section appears to include every kind of waste upon which no severalty right attaches, whilst it also enumerates every kind of commonable land upon which severalty rights do exist for a longer or shorter period of each year. It provides also for the case of stinted pastures and commonable woodlands. It seems generally to include every class of lands subject to rights of common, or to any right which can interfere with the free cultivation of the soil.

all gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattle gates or other gates or stints, or any of them; and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattle gates or other gates or stints, or any of them; all land held, occupied, or used in common, either at all times or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds or otherwise distinguishable; all land in which the property or right of or to the vesture or herbage, or any part thereof, during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil; and all lot meadows and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise, shall be land subject to be inclosed under this Act.

Common Lands not to be inclosed without Authority of Parliament, nor Sea Embankments made without Consent of the Admiralty.

Wastes of manors and lands sub-

XII. Provided always, and be it enacted, that no waste land of any manor on which the

tenants of such manor have rights of common, nor any land whatsoever subject to rights of common which may be exercised at all times of every year for cattle levant and couchant upon other land, or to any rights of common which may be exercised at all times of every year, and which shall not be limited by number or stints, shall be inclosed under this Act without the previous authority of Parliament* in each particular case, as hereinafter provided; provided also, that neither this Act, nor anything which may be done under or by virtue thereof, shall authorize to be made any embankment, erection, or encroachment, without the consent of the commissioners for executing the office of Lord High Admiral of the United Kingdom of *Great Britain* and *Ireland*, and where the consent of any grantee of the office of admiral or vice-admiral might have been required by law if this Act had not been passed, the consent also of such grantee, in or upon the shore of any harbour, or the bank of any navigable river so far as the tide flows up the same, or shall give to or confer upon any person any right, title, estate, or interest to or in any such embankment, erection, or encroachment already made

Subject to indefinite common rights at all times not to be inclosed without previous direction of parliament.

* The distinction would appear to be that all lands upon which severalty rights attach may be inclosed by the authority of the commissioners; waste lands upon which there are no severalty rights must be reserved for parliament.

other than what he may legally have at the time of the passing of this Act, or confer upon any person whatsoever any right, title, estate, or interest whatsoever in any lands or soil whereon the tide of the sea flows and re-flows.

Act does not apply to the New Forest or to the Forest of Dean.

New Forest and Forest of Dean excepted.

XIII. Provided also, and be it enacted, that no part of the *New Forest* in the county of *Southampton*, or of the *Forest of Dean* in the county of *Gloucester*, shall be land subject to be inclosed under this Act.

*Lands in the Neighbourhood of large Towns.**

Land within certain distances of large towns not to be inclosed without the previous direction of parliament.

XIV. Provided also, and be it enacted, that no lands situate within fifteen miles of the city of *London*, or within two miles of any city or town of ten thousand inhabitants, or within two miles and a half of any city or town of

* This section applies to all the species of lands comprised under the 11th section, and renders the assent of parliament necessary not only to the inclosure of common lands in the neighbourhood of towns, but also of shack lands and stinted pastures. It is difficult to conceive why the inclosure of shack and stinted pastures should be reserved, since, although the public may be considered to have acquired some interest in commons (and these are expressly reserved for the consideration of parliament by the 12th sect.), the public can scarcely have any interest in the cultivated fields which are the subject of shack.

twenty thousand inhabitants, or within three miles of any city or town of thirty thousand inhabitants, or within three miles and a half of any city or town of seventy thousand inhabitants, or within four miles of any city or town of one hundred thousand inhabitants, shall be subject to be inclosed under the provisions of this Act without the previous authority of Parliament in each particular case, as hereinafter provided; and in all such cases the number of inhabitants shall be ascertained by the then last parliamentary census thereof, and that the distance shall be measured in a direct line from the town hall, if there shall be any town hall, or if there shall be no town hall then from the cathedral or church, if there shall be only one church, or if there shall be more churches than one then from the principal market place of any such city or town.

Village Greens.

Village greens not to be inclosed; but provision may be made for preserving the surface and fixing boundaries

XV. And be it enacted, that no town green or village green shall be subject to be inclosed under this Act; provided that in every case in which an inclosure of lands in the parish in which such town green or village green may be situate shall be made under the authority of this Act, it shall be lawful for the commissioners if they shall think fit, to direct that such town green or village green, provided

such green be of equal or greater extent, be allotted to the churchwardens and overseers of the poor of such parish, in trust to allow the same to be used for the purposes of exercise and recreation, and the same shall be allotted and awarded accordingly, in like manner, and with the like provisions for making or maintaining the fences thereof, and preserving the surface thereof, and draining and levelling the same where occasion shall require, as hereinafter directed concerning the allotments to be made for the purposes of exercise and recreation; and such green may be so allotted in addition to other land which may be allotted for the purposes of exercise and recreation, or, if the commissioners shall think it sufficient, may be allotted in substitution for other land which might have been required to be allotted for such purposes; and in every case in which such town green or village green shall adjoin land subject to be inclosed under this Act, and shall not be separated from such land by fences or known bounds, the commissioners shall, in the provisional order concerning such inclosure, set out a boundary line between such green and the adjoining land, and shall in their annual general report mention and describe such boundary.

Who shall be deemed Landowners or interested in Lands.*

XVI. And be it enacted, that for the purposes of this Act the persons interested in land subject to be inclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, shall be deemed to be the persons hereinafter mentioned, and no others; (that is to say,) the persons who shall be in the actual possession or enjoyment of any such land or any part thereof, or any common or common right thereon, or any manor of which such land or any part thereof shall be waste, or

Persons interested in lands for purposes of applications, &c.

* The parties who are not to be deemed to be parties interested for the purposes of this Act are:—

Tenant for life or lives, or years, holding at a rent of two thirds the value.

Tenant for a term of years originally not exceeding fourteen.

Tenants from year to year.

Tenants at will.

In these cases the persons entitled in reversion immediately expectant will vote.

In the next class of cases the payer and receiver of the rent will have a joint vote; viz.:—

Tenants for life or lives, or for a term of years originally exceeding fourteen, paying a rent less than two thirds the value.

In the third class the person in possession and person dispossessed have a joint vote; viz.:—

Where a person is in possession under a writ of execution, or receives under an order of a Court of Equity.

Saving these classes of exceptions, persons in actual possession or enjoyment, or receipt of rents and profits, shall be deemed to be the parties interested.

It is by no means difficult to imagine cases of great intricacy and difficulty that may arise under this section.

who shall be in the actual receipt of the rents and profits of such land, or part thereof, common or common right, or manor respectively, (except any tenant for life or lives, or for years, holding under a lease or agreement for a lease on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof, and except any tenant from year to year at will or sufferance,) and that without regard to the real amount of interest of such persons; and in every case in which any such land, common, or common right, or manor, shall have been leased or agreed to be leased to any person or persons for life or lives or for years by any lease or agreement for a lease on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved; and in every case in which any such land, common, or common right, or manor, shall be in the possession of a tenant from year to year at will or sufferance, or shall have been leased or agreed to be leased for a term which shall not have exceeded fourteen years from the commencement thereof, the person who shall for the time being be entitled to the said land, common, or common right, or manor, in reversion immediately expectant

on the term created or agreed to be created by such lease or agreement for a lease respectively, or subject to the tenancy from year to year at will or sufferance, shall be deemed for the purposes of this Act to be the person interested as aforesaid in respect of such land, common, or common right, or manor; and in every case in which any such land, common, or common right, or manor, as aforesaid, shall have been leased or agreed to be leased to any person for life or lives or for years by any lease or agreement for a lease in which a rent less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall for the time being be in the actual receipt of the rent reserved upon such lease or agreement for a lease, shall, jointly with the person who shall be liable to the payment of such rent of such land, common, or common right, or manor, be deemed for the purposes of this Act to be the person interested in respect of such land, common, or common right, or manor respectively; and in every case in which any person shall be in possession or enjoyment or receipt of the rents or profits of any such land, common, or common right, or manor, under any sequestration, extent, elegit, or other writ of execution, or as a receiver under any order of a Court of Equity, the person who but for such writ or

order would have been in possession, enjoyment, or receipt of the rents and profits, shall, jointly with the person in possession, enjoyment, or receipt by virtue of such writ or order, be deemed for the purposes of this Act to be the person interested in respect of such land, common, or common right, or manor respectively.

Crown Lands.

Where the crown is interested, who shall be substituted.

XVII. And be it enacted, that whenever her Majesty shall be interested in land as aforesaid the first commissioner of her Majesty's woods, forests, land revenues, works, and buildings for the time being, or in case her Majesty shall be so interested in right of the duchy of *Lancaster*, the chancellor of the duchy of *Lancaster* shall for the purposes of this Act, and to the extent of such respective interest, be substituted for the person interested as aforesaid.

Where Duke of Cornwall is interested, who shall be substituted.

XVIII. And be it enacted, that whenever the Duke of *Cornwall* shall be interested in land as aforesaid the lord warden of the stannaries shall for the purposes of this Act, and to the extent of such interest, be substituted instead of the person interested as aforesaid.

Joint Tenants.

XIX. And be it enacted, that whenever an interest in land according to the provisions of this Act shall be vested in several persons as co-trustees or in joint tenancy, such persons shall for the purpose of this Act be considered as jointly interested, and entitled to one vote only in respect of their joint interest; but any one or more of such persons may, unless the other or others of them shall dissent therefrom, act or vote under this Act; and the majority in number of any such persons may, notwithstanding any dissent of the minority, act or vote under this Act in the same manner as if all such persons had concurred; and whenever several persons as tenants in coparcenary or in common shall be so interested, each coparcener or tenant in common shall for the purposes of this Act, and to the extent of the value of his respective undivided share, be deemed separately interested and entitled to vote as if he were tenant in severalty. Provision for persons jointly interested.

Incapacitated Persons.

XX. And be it enacted, that whenever any person interested in land as aforesaid shall be an infant, lunatic, idiot, feme covert, or under any other legal disability, or beyond the seas, the guardian, trustee, committee of the estate, In case of disability, commissioners to name substitutes.

husband, or attorney repectively, or in default thereof such person as may be nominated for that purpose by the commissioners, and whom they are hereby empowered to nominate under their hands and seal, shall for the purposes of this Act be substituted in the place of such person so interested.

Appointment of Attorneys.

Attorneys may be appointed by persons interested.

XXI. And be it enacted, that it shall be lawful for any person interested in any land subject to be inclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, by a power of attorney, given in writing under his hand, to appoint an agent to act for him for the purposes of this Act; and all things which by this Act are directed to be done by or with relation to any such person may be lawfully done by or with relation to the agent so duly authorized of such person; and every such agent shall have full power, in the name and on behalf of his principal, to sign, concur in, and execute any application or act, to signify consent or dissent, and to vote on any question arising out of the execution of this Act; and every person shall be bound by the acts of any such agent, according to the authority committed to him, as fully as if the principal of such agent had so acted; and the power of attorney under which

the agent shall have acted, or a copy thereof, authenticated by the signature of a witness or witnesses, shall be deposited in the office of the commissioners; and any such power of attorney may be in the form following :—

Form of power of attorney.

'I of do hereby 'appoint of to be 'my attorney for all the purposes of an Act 'passed in the years of her present 'Majesty, intituled .'

Poor Rate Assessments to be used where possible, for estimating the Interest of Owners.

Proportional interests, how estimated.

XXII. Provided always, and be it enacted, that the proportional value of the respective interests of the several persons interested in any land subject to be inclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, shall, so far as relates to the power to sign any application, or to give any notice or consent, or to vote at any meeting under this Act, be estimated as hereinafter mentioned; (that is to say,) where their interests shall be in respect of land or other rateable property, then according to the proportional sums at which such land or rateable property shall be rated to the relief of the poor;* and when their interests shall be

* Where the right claimed is appendant or appurtenant, the proportionate rate must be estimated by the

in respect of rights of common enjoyed or claimed in respect of any land, and not defined by numbers or stints, then according to the proportional sum at which the land in respect of which they enjoy or claim such rights of common shall be rated to the relief of the poor; and in case such interests shall be in respect of rights in a gated or stinted pasture, or of other rights defined by numbers or stints, then according to the proportional amount of their respective numbers or stints; but in case such interest shall be in respect of rights of common in gross, not rated to the relief of the poor, and not defined by numbers or stints, or in case, from any other cause, it shall appear to the commissioners, or to the assistant-commissioner presiding at any meeting held for the purposes of this Act, impracticable to estimate such proportional value in manner aforesaid, it shall be lawful for the commissioners or such assistant-commissioner to direct in what manner such proportional value shall be estimated, regard being had to the circumstances of each particular case: provided always, that in every case in which such assistant-commissioner shall have directed in what manner such pro-

rental of the old inclosure to which the right is either appendant or appurtenant, as the right itself is not subject to be rated. A common right in gross is a tenement liable to be rated; as is also a stinted pasture. See ante, p. 40.

portional value shall be estimated under the power hereinbefore contained he shall specially report to the commissioners the circumstances under which it shall have become necessary to exercise such power, and the directions he shall have given in the exercise thereof.

Proportional interests of lords of manors.

XXIII. And be it enacted, that the proportional value of the interest of the lord of a manor interested as lord in any land subject to be inclosed under this Act, or, in case there shall be several lords of a manor or lords of several manors so interested in any land subject to be inclosed under this Act, the proportional value of the respective interests of such lords shall for the purposes aforesaid be estimated in such manner as the commissioners may direct.

*Commissioners shall print and circulate Forms.**

Commissioners to frame forms of applications, &c.

XXIV. And be it enacted, that the commissioners shall frame, and cause to be printed and circulated as they shall see occasion, forms indicating the particulars of the information to be furnished to the commissioners by persons proposing to inclose land under the provisions of this Act, with reference to

* These printed forms may be had upon application to the commissioners, directed "To the Inclosure Commissioners, London."

the extent and nature of the land to be inclosed, to the mines, minerals, or valuable strata (if any) under the same, to the questions of boundary (if any) concerning such land, or such mines, minerals, or strata, to the numbers and occupations of the inhabitants of the parish or place, to its vicinity to or distance from any city or town or populous district, to the parties interested in the proposed inclosure, and the numbers who have assented to or dissented from the application, to the nature of the rights which require the intervention of the commissioners or the interference of Parliament, to the supposed advantages of the proposed inclosure, to the allotments (if any) proposed to be made for exercise and recreation and for the labouring poor, and to the allotment (if any) agreed on or proposed to be made to the lord of the manor, in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed, in respect of his right and interest therein, and such other information as in the judgment of the commissioners may assist them in forming an opinion on such application, and also such other forms as the commissioners may deem requisite or expedient for facilitating proceedings under this Act.

PRELIMINARY MEETING.

Upon Application by One Third in Value, Assistant-Commissioners to hold a Meeting, to inquire into Expediency of Inclosure and hear Objections.

Upon application to the commissioners, an assistant-commissioner to inquire into the expediency of proposed inclosure.

XXV. And be it enacted, that any persons interested in land subject to be inclosed,* and proposing to inclose the same under this Act, may make application to the commissioners according to the form which may have been circulated as aforesaid by the commissioners to sanction such inclosure, or to certify in their annual general report the expediency of such inclosure, as the case may require; and in case the commissioners shall, on the statements contained in such application, think that the inclosure of such land, or of some part thereof, may be found to be expedient, they shall refer such application to an assistant-commissioner, who shall inspect the land proposed to be inclosed, and inquire into the correctness of the statements in such application, and otherwise into the expediency of the proposed inclosure; and such assistant-commissioner shall hold a meeting or meetings, to

* See the Amendment Act, 11 & 12 Vict. c. 99, s. 1, post. Persons interested in land not subject to be inclosed may submit such land to the operation of the inclosure Act, in consideration of an allotment.

hear any objections which may be made to the proposed inclosure, and any information or evidence which may be offered in relation thereto, and may adjourn such meetings respectively, and shall cause notice to be given on the church door of the parish in which the land proposed to be inclosed, or the greater part thereof, shall be situate, and also a like notice to be given by advertisement of the time and place of every such meeting, fourteen days at least before every such meeting (meetings by adjournment only excepted): provided nevertheless, that it shall not be lawful for the commissioners to refer such application to the assistant-commissioner, nor for the assistant-commissioner to take any further proceedings upon any such application, unless it shall be made to appear to them or him respectively that the persons making such application represent at least one third in value of the interests in the lands therein proposed to be inclosed.*

* By this provision the commissioners have no jurisdiction until the application has received the signatures of one third of the interest in the waste.

It may be noted here that if the application be properly made by one third of the interest in the waste, and the applicants should afterwards fail in obtaining the consent of two thirds to the provisional order of the commissioners, the expenses of the commission fall upon the consolidated fund: as, by sect. 130, the commissioners have power to levy rates for expenses only where an inclosure has actually taken place.

Assistant-Commissioners to report whether Inclosure should take place, and, if so, upon what Terms.

Assistant-commissioner to report on application.

XXVI. And be it enacted, that the assistant-commissioner to whom such application shall be referred shall report in writing to the commissioners the result of his inquiries as to the statements contained in the application, and his opinion as to the expediency or inexpediency of the proposed inclosure, with the reasons for such opinion; and in case he shall think such inclosure expedient, he may specify any terms or conditions* which may appear to him to be proper for the protection of any public interests, and of any mineral property or peculiar rights in relation to the land proposed to be inclosed, and shall annex to his report a map or sketch of the land proposed to be inclosed, and in case he shall be of opinion that allotments for exercise and recreation or for the labouring poor should be made in the proposed inclosure, such sketch shall show the place in which it shall appear to him that such allotments should be made.

* By the first Amendment Act, 9 & 10 Vict. c. 70, s. 5, one of these conditions may be that the lord shall have a rent-charge instead of an allotment.

PROVISIONAL ORDER.

Commissioners to make Provisional Order—to contain Terms and Conditions of Inclosure—to be deposited in the Parish—Meeting to be held to ascertain Interests and collect Assents—Two Thirds necessary—Consent of Cities and Towns, how to be obtained.*

Commissioners to embody the conditions of proposed inclosure in a provisional order, and to take consents of parties interested.

XXVII. And be it enacted, that if on the report of the assistant-commissioner, or after any further inquiries they shall think necessary in relation thereto, the commissioners shall be of opinion, having regard as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed or any part thereof shall be situate, as to the advantage of the proprietors of the land to which such application shall relate, that the proposed inclosure would be expedient, the commissioners, by provisional order under their seal, shall set forth the terms and conditions on which they shall be of opinion that the inclosure should be made, and especially the quantity and situation of the allotments (if any)

* The Amendment Act, 9 & 10 Vict. c. 70, s. 1, provides that provisional orders may be varied or amended by a supplemental provisional order.

which under the provisions of this Act should be appropriated for the purposes of exercise and recreation and for the labouring poor, and, in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed, shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses, in case the expenses shall, under the provisions hereinafter contained, be so directed to be paid by sale of land; and after deducting the allotments to be made for public purposes, should be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be inclosed, as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed, and in case there shall be any mineral property, or any rights in relation thereto, not vested in the lord of the manor, or other rights which shall appear to the commissioners proper to be specially provided for upon such inclosure, or to be excepted from the operation thereof, shall spe-

cify the provisions or exceptions which should be made in that behalf; and the commissioners shall thereupon cause notice to be given of their intention to authorize the proposed inclosure, or (as the case may be) to certify in their annual general report the expediency of the proposed inclosure, but upon the terms and conditions in such order expressed, and in case the consents required by this Act should be given within the time in such notice specified, or within any enlarged time which the commissioners may allow for that purpose; and the commissioners shall cause to be deposited for inspection a copy of such provisional order in the parish or place in which the land proposed to be inclosed, or some part thereof, shall be situate, and may, in case they shall think fit, cause meetings to be holden by an assistant-commissioner for the purpose of taking consents or dissents, or of ascertaining the interests of consenting or dissenting parties, or give such directions as to the mode of taking and verifying consents as they shall think fit; and in case it shall appear to the satisfaction of the commissioners that persons the aggregate amount of whose interests in the land proposed to be inclosed shall not be less in value than two thirds of the whole interest in such land, and the other persons, if any, whose consents may be necessary under the provisions hereinafter contained, shall

have consented to such inclosure, upon the terms and conditions in such order expressed, then, if the land proposed to be inclosed cannot be inclosed under this Act without the previous direction of parliament, the commissioners shall in their next annual general report certify their opinion that the proposed inclosure would be expedient, with such particulars in relation thereto, or to the terms and conditions aforesaid, as they shall think necessary; and in case the land proposed to be inclosed shall be land to the inclosure of which under this Act the previous direction of parliament is not hereby required, the commissioners shall cause notice to be given on the church door and by advertisement of their intention to proceed with such inclosure under the provisions herein contained:* provided always, that where the freemen, burgesses, or inhabitant householders of any city, borough, or town, shall be entitled to rights of common or other interests in the land proposed to be inclosed, the commissioners shall not certify the expediency of the proposed inclosure, or proceed further under this Act, unless it shall appear to the commissioners that two thirds in number of such of the freemen and burgesses so entitled as may be resident in such city,

* By the Amendment Act, 11 & 12 Vict. c. 99, s. 1, (see post,) the provisional order may set forth any special agreement or matter concerning the lands to be inclosed.

borough, or town, or within seven miles thereof, or of such inhabitant householders, as the case may be, shall have consented to such inclosure, on the terms and conditions in their provisional order specified; and in case two thirds in number of such resident freemen and burgesses, or of such inhabitant householders, shall have so consented, such consent shall be deemed the consent of the class of freemen, burgesses, or inhabitant householders, as the case may be, so entitled.*

Where Two separate Tracts of Land are joined in One Application, Two Thirds of the Interest in each Tract must assent.

Separate applications for separate tracts.

XXVIII.† And be it enacted, that when it shall appear to the commissioners that land proposed to be inclosed under this Act shall be in part a tract of open and common arable, meadow, or pasture lands or fields, and in

* The assenting parties must be, not mere claimants, but persons in actual enjoyment of a legal right. The user of inhabitants, as such, will not be, it is submitted, a sufficient interest to render their consent necessary under this section; but see ante, pp. 24, 78, and note to sect. 54, post.

† Sect. 8, of 12 & 13 Vict. c. 83, renders the assent of two thirds in value of persons interested in the entirety of such tracts sufficient.

Where the title to a manor is litigated, the consent of both claimants is equivalent to the consent of the actual owner. See Amendment Act, 10 & 11 Vict. c. 111, s. 1, and post.

part a tract of common or waste lands subject to rights of common, or shall otherwise consist of separate and distinct tracts subject to separate and distinct rights or classes of rights, and the persons interested in one of such tracts shall not be all interested in the other of them, it shall be lawful for the commissioners to ascertain whether persons interested in each of such tracts whose interests shall not be less than two thirds in value of the whole interest therein shall consent to the proposed inclosure, on the terms and conditions in their provisional order specified; and in case it shall thereupon appear that such proportion in value of the persons interested in any such tract as aforesaid shall not have consented, the said commissioners shall not proceed further under this Act in respect of such tract, or certify in their annual general report the expediency of the inclosure thereof, unless or until persons interested therein whose interest shall not be less than two thirds shall have consented thereto.

Veto given to Lord of the Manor.

XXIX. Provided always, and be it enacted, that when the land to which such application shall relate shall be the waste of any manor, or land within any manor to the soil of which the lord of such manor shall be entitled in right

Consent of the lord of the manor.

of his manor, then, unless there shall be [illegible] than one person interested in such manor, according to the definition of this Act, the commissioners shall not proceed to an inclosure on such application, or certify in their annual general report the expediency thereof, unless the person interested in the land subject to be inclosed as aforesaid in right of such manor, or his substitute under this Act, shall consent to such inclosure; and where there shall be more than one person interested in such manor the commissioners shall not proceed to an inclosure, or certify as aforesaid the expediency thereof, in case such persons, or the majority of such persons in respect of interest, shall signify their dissent within the time limited by the commissioners.

ALLOTMENTS TO PARTIES HAVING NO INTEREST IN THE COMMONS.

To Inhabitants of the Neighbourhood, for Exercise and Recreation.

Allotments for exercise and recreation may be required as conditions of inclosure.

XXX. And be it enacted, that in the provisional order of the commissioners concerning the inclosure under the provisions of this Act of any waste land of any manor on which the tenants of such manor have rights of common, or of any other land subject to rights of common which may be exercised at all times of the year for cattle levant and couchant, or to

any rights of common which may be exercised at all times of the year, and which shall not be limited by number or stints, it shall be lawful for the commissioners to require, and in their provisional order to specify, as one of the terms and conditions of such inclosure, the appropriation of an allotment for the purposes of exercise and recreation for the inhabitants of the neighbourhood, not exceeding the quantity hereinafter mentioned applicable to each case; that is to say, where the land to be inclosed shall be situated in any parish the population of which according to the then last previous parliamentary census shall amount to or exceed ten thousand persons, ten acres; where the land to be inclosed shall be situate in any parish the population of which according to such census shall amount to or exceed five thousand persons and be less than ten thousand persons, eight acres; and where the land to be inclosed shall be situate in any parish the population of which according to such census shall amount to or exceed two thousand persons and be less than five thousand persons, five acres; and in every case, except as aforesaid, not exceeding four acres; and if in the provisional order for such inclosure the commissioners shall not have required the appropriation of an allotment for the purposes of exercise and recreation, the commissioners shall in their annual general report state the grounds on which

they shall have abstained from requiring such appropriation.*

For Labouring Poor.

Allotments for labouring poor.

XXXI. And be it enacted, that in the provisional order of the commissioners concerning the inclosure under the provisions of this Act of any waste land of any manor on which the tenants of such manor have rights of common, or of any land whatsoever subject to rights of common which may be exercised at all times of the year for cattle levant and couchant, as aforesaid, or to any rights of common which may be exercised at all times of the year, and which shall not be limited by number or stints, it shall be lawful for the commissioners to require and specify as one of the terms and conditions of such inclosure the appropriation of such an allotment for the labouring poor as the commissioners shall think necessary, with reference to the circumstances of each particular case, such allotment, nevertheless, to be subject to a rent-charge, to be payable thereout to any person or persons who may be entitled to allotments under such inclosure as hereinafter provided; and if in the provisional order for such inclosure the commissioners shall not have required the appropriation of an allotment

* See the provision of the first Amendment Act, 9 & 10 Vict. c. 70, s. 4.

for the labouring poor, the commissioners shall in their annual general report state the grounds on which they shall have abstained from requiring such appropriation.

GENERAL SESSIONAL ACT.

Acts for the inclosure of lands in pursuance of the reports of the commissioners to be deemed public general acts.

XXXII. And be it enacted, that in case by any act of parliament hereafter to be passed it shall be enacted that the inclosures the expediency of which shall have been certified by the commissioners in their annual general report as aforesaid, or any of them be proceeded with, the same shall in every case be proceeded with and completed according to the provisions of this Act, and on the terms and conditions in the provisional order of the commissioners specified in that behalf; and every such act of parliament hereafter to be passed containing such enactment as aforesaid shall be deemed a public general act.*

* This sessional act authorizes eo nomine the inclosure of those wastes which the commissioners report in favour of, supposing the legislature to assent to their report. The act is a public act, one which imposes no expense or necessity for exertion on the landowners or commoners. The chief excellence of the statute before us seems to be, that at a very trifling expense—that of an application to the commissioners, and of a meeting before an assistant-commissioner, for the purpose of satisfying the commissioners as to the expediency of the inclosure, and the subsequent assents to the provisional order—it puts

THE VALUER.

Appointment of Valuer.

Meeting for appointing valuer.

XXXIII. And be it enacted, that as soon as conveniently may be after the passing of any act of parliament by which any inclosure shall be directed to be proceeded with under the provisions of this Act, or (in the case of land subject to be inclosed under this Act without the previous direction of Parliament) as soon as conveniently may be after the expiration of thirty days from the publication by the commissioners of the notice of their intention to proceed with an inclosure under this Act, the commissioners shall call a meeting of the persons interested in the land to be inclosed, of which twenty-one days' notice shall be given by advertisement, to be held for appointing a valuer to divide, set out, and allot such land, or so much thereof as shall not be directed to be set out for public purposes, among the persons interested therein, and to set out, divide, and improve, in such manner as hereinafter mentioned, so much thereof as shall be directed to be set out for public purposes; and the commissioners, if they shall so think fit, may appoint an assistant-commissioner to be present

the parties in the same position as they would have held under the old system, had they obtained a private inclosure act.

and to preside at such meeting, and to take the votes of the persons present thereat; and the persons, or their agents, present at the meeting, or the majority in number, and the majority in respect of interest, may appoint a valuer; and in case the majority in number and the majority in respect of interest shall not agree upon the appointment, then the commissioners shall appoint a valuer: provided always, that no person shall in anywise act as an assistant-commissioner in an inclosure under this Act, or be appointed a valuer in such inclosure, who shall be interested in such inclosure, or shall be the agent ordinarily entrusted with the care, superintendence, or management of the estate of any person so interested.

Instructions to Valuer.

XXXIV. And be it enacted, that at the meeting for appointing a valuer, or at some other meeting called by the commissioners for the purpose, the persons present, by themselves or their agents, at such meeting, or the majority in number and in respect of interest of such persons, may resolve upon instructions to the valuer not inconsistent with the terms and conditions of the provisional order of the commissioners, and of any act hereafter to be passed by which the inclosure may have been authorized, for the appropriation of parts of

Instructions to valuer.

the land proposed to be inclosed for such public purposes as hereinafter mentioned, or any of them; that is to say, for the formation of public roads and ways; for widening or improving existing public roads and ways; for a supply of stone, gravel, or other materials for the repairs of the roads and ways within the parish in which such land shall be situate; for the formation of such public drains, watercourses, or embankments as may appear conducive to the health and advantage of such parish or the neighbourhood; for the formation or improvement of public ponds, wells, and watering-places; for a place of exercise and recreation for the inhabitants of the neighbourhood; for allotments or field gardens for the labouring poor; for a supply of fuel for the poor or other inhabitants of such parish; for land for any burying-ground, or enlarging any burying-ground; for the site of any church or chapel, parsonage-house, school, workhouse, or garden to be attached thereto respectively; or for any other purpose of public utility or convenience, or for the general convenience or accommodation of the persons interested in the land to be inclosed; and also, upon instructions to such valuer, for the formation, alteration, or improvement on the land to be inclosed of private or occupation roads and ways, common ponds, ditches, watercourses, embankments, tunnels, bridges, and fences, or any of

them, or any other works for the improvement of such land, or for the convenience of the occupiers of the respective allotments thereof; and also for the adoption and use, for the purposes of the inclosure, of a copy of any map or plan which shall have been confirmed under the hands and seal of the tithe commissioners of the land in question, or of any other map or plan of the accuracy of which the inclosure commissioners shall be satisfied, or for making any new survey, map, or plan; and as to all other matters and things which may be proper to be done in the matter of the inclosure; and also for the raising and payment of all expenses incident to such inclosure, either by sale of part of the land proposed to be inclosed, or by such rate as hereinafter provided, as to the persons present at such meeting, or such majority as aforesaid, shall seem fit; and the majority in number and value as aforesaid may make any agreement with the valuer for the payment of such valuer for the duties to be performed by him under this Act; and all such instructions, and such agreement (if any), shall be reduced into writing, and shall be sent by the assistant-commissioner (if any) present at the meeting, or otherwise by the chairman of the meeting, to the office of the commissioners; and it shall be lawful for the commissioners, having regard to the protection of the rights of all persons

interested in the inclosure, to allow or disallow such instructions in whole or in part, or to make such alterations therein or additions thereto, not inconsistent with the terms and conditions of such provisional order and act as aforesaid, and to allow or disallow such agreement, as they shall think proper; and in case no instructions shall have been so resolved upon, and sent to the commissioners, or in case they shall disallow the instructions so resolved upon and sent, it shall be lawful for the commissioners to frame such instructions as they shall think proper, not inconsistent with the terms and conditions of such provisional order and act as aforesaid; and in case no such agreement shall have been sent, or the agreement sent shall have been disallowed, it shall be lawful for the commissioners to make such order for the payment of the valuer as they shall think proper; and a copy, under the seal of the commissioners, of all such instructions, as the same shall have been allowed, altered, or framed as aforesaid, shall be delivered to the valuer, with a copy of such provisional order and act of parliament (if any) as aforesaid; and the valuer shall in his proceedings in such inclosure observe and obey the directions and declarations of such provisional order, act, and instructions respectively.*

* The 12 & 13 Vict. c. 83, s. 3, authorizes subsequent meetings for the purpose of giving further instructions

Contested Claims may be decided by Assistant-Commissioner specially appointed as Assessor.

Valuer may be assisted by an assistant-commissioner.

XXXV.* And be it enacted, that the said valuer, upon the hearing and determining of any contested claim or objection, or upon awarding any costs, as hereinafter mentioned, shall, if he think proper, or if the persons interested shall in their instructions to the valuer so direct, be assisted by an assistant-commissioner, specially appointed as an assessor, who shall be a practising barrister-at-law of five years' standing at the least;† and the determinations of the said valuer as to all such contested claims and objections, and costs, shall be made pursuant to and in conformity with the decisions of such assessor: provided nevertheless, that such assessor shall not interfere further in the execution of this Act than in settling what contested claims shall be allowed or disallowed, and what costs, if any, shall be allowed to or paid by any parties making or objecting to such claims.

to the valuer; but it would appear, from a consideration of this section in conjunction with the 55th and 56th sections, that no appeal to the Courts will lie from an investigation thus conducted; but that there must be a demand of rehearing before an assistant-commissioner.

* It has been the practice of the commission, in all questions of intricacy, to appoint an assessor from among their legal assistants, to assist the valuer.

† This qualification is abolished by the 9 & 10 Vict. c. 70, s. 13.

Instructions to Valuer.

Alterations in the instructions to valuer by commissioners not to be acted upon unless sanctioned by a majority of the persons interested.

XXXVI. Provided always, and be it enacted, that if the commissioners shall alter or add to the instructions to the valuer which shall have been resolved upon at a meeting of the persons interested as aforesaid, or shall disallow any such instructions and frame other instructions in lieu thereof, the commissioners shall cause to be deposited for inspection, as hereinbefore directed with respect to the provisional order, a copy of the instructions so altered, or of the instructions so added to with the additions, or of the instructions so framed by the commissioners, as the case may be, and shall call a meeting, with fourteen days' notice, of the persons interested as aforesaid, for the consideration thereof; and if such altered instructions, or such additions to the instructions, or the instructions so framed by the commissioners, as the case may be, shall not be approved by the majority in number and the majority in respect of interests of the persons present at such meeting or at some adjournment thereof, or at some other meeting of the persons interested as aforesaid, called with such notice as aforesaid, such inclosure shall not be proceeded with unless and until some instructions to the valuer, resolved upon or approved by the ma-

jority in number and the majority in respect of interests at some meeting of the persons interested as aforesaid, called with such notice as aforesaid, or at some adjournment thereof, shall be finally allowed by the commissioners.

A surveyor may be appointed where the parties interested think fit.

XXXVII. And be it enacted, that at the meeting for appointing a valuer, or at some other meeting called by the commissioners for this purpose, it shall be lawful for the persons, or their agents, present at such meeting, or the majority in number, and the majority in respect of interest (if they shall so think fit), to appoint a surveyor for the purposes of such inclosure, to assist or act under the directions of the valuer in the admeasurement, mapping, and setting out of the lands to be inclosed.

Valuer's Declaration.

Form of declaration by valuer.

XXXVIII. And be it enacted, that no valuer shall be capable of acting until he shall have made and subscribed, before the said commissioners or some assistant-commissioner, justice of the peace, or master extraordinary in Chancery, the following declaration; (that is to say,)

'I do solemnly declare, that I will 'faithfully, impartially, and honestly, according 'to the best of my skill and judgment, perform 'all the duties of a valuer in the inclosure of

' according to the provisions of an Act 'passed in the year of the reign of her 'Majesty Queen *Victoria*, intituled .'

Which declaration it shall be lawful for the commissioners or any assistant-commissioner, justice, or master extraordinary in Chancery, to administer; and every such declaration so made and subscribed shall be countersigned by the person before whom the same shall have been made, and shall be sent by him to the office of the commissioners; and a certificate, under the seal of the commissioners, that the person named in such certificate has been appointed a valuer in the matter of an inclosure, and has made and subscribed the declaration required by this Act, shall be conclusive evidence of such appointment, and of his having made and subscribed such declaration.

Boundaries of Parishes and Manors.

Power to set out boundaries of parishes.

XXXIX.* And be it enacted, that in case it shall be represented to the commissioners by the valuer acting in the matter of any inclosure, that the boundaries of any parish or manor in which the land proposed to be inclosed, or any part thereof, shall be situate, and of any

* By sect. 9, of 12 & 13 Vict. c. 83, all these provisions are extended to the fixing boundaries of hamlets, &c., and of manors that do not abut upon any other manor.

parish or manor adjoining thereto, are not then sufficiently ascertained and distinguished, it shall be lawful for the commissioners, or any assistant-commissioner by them appointed for that purpose, after giving such notices as they or he shall think necessary for the protection of the rights of all persons interested in this behalf, to ascertain and set out the same respectively in writing under the hand and seal of such assistant-commissioner, or under the seal of such commissioners; and after the said boundaries shall be so ascertained and set out and fixed, the same shall and are hereby declared to be the boundaries of such parishes and manors respectively;* and the commissioners or assistant-commissioner shall, within one calendar month after ascertaining and setting out the boundaries, publish the same, by causing a description thereof in writing to be delivered to or left at the place of abode of one of the churchwardens or over-

* The provisions of the Tithe Commutation Act enable that commission, with certain assents, to settle boundaries for all purposes. The inclosure commission appears, however, only to take power to settle boundaries for the purposes of their own act. The difficulties arising from numerous concurrent jurisdictions for settling boundaries for particular purposes are very great. It is submitted that it would be a great public good if the ordnance surveyors were enabled, after perambulation, deposit of a map, and appeal allowed to the inclosure or tithe commission, to settle boundaries for all purposes and for ever.

seers of the poor of each of the parishes of which the boundary shall be so set out, and of the lords of the several manors of which the boundary shall be so set out, or of the stewards of the respective manors, and shall give notice that such boundary has been so set out, and that such description has been so left as aforesaid, by advertisement: provided always, that any person interested in the determination of the commissioners or assistant-commissioner respecting the said boundaries, who shall be dissatisfied with such determination, may within one calendar month next after the publication of the said boundaries, by delivering or leaving such description as aforesaid, give notice in writing of his dissatisfaction to the commissioners, specifying the particulars in respect whereof he may be dissatisfied, and request that the matter in dispute may be submitted to the determination of a jury; or any person dissatisfied may, within one calendar month after such publication of the said boundaries, give notice in writing to the commissioners of such dissatisfaction, and of such particulars thereof, and of his intention to apply to the Queen's Bench to remove the determination of the commissioners or assistant-commissioner, by certiorari, into the said court; and in every case in which any person shall have requested that the matter in dispute may be submitted to the determination of a

Appeal on questions of boundary.

jury as aforesaid, and no notice shall have been given to the commissioners by any person, within the time hereinbefore limited, of his intention to apply to the Court of Queen's Bench to remove the determination of the commissioners or assistant-commissioners, by certiorari, as aforesaid, or such determination shall not have been removed within the time hereinafter limited, the commissioners shall and they are hereby required to issue a warrant under their hands and seal to the sheriff of the county in which the parishes and manors in question, or one them, shall be situate, commanding such sheriff to impannel, summon, and return, and such sheriff is hereby accordingly empowered and required to impannel, summon, and return, a jury of at least eighteen sufficient and indifferent men, qualified according to the laws of the realm to be returned for trial of issues in her Majesty's courts of record at *Westminster;* and the persons so to be impannelled, summoned, and returned are hereby required to appear before any assistant-commissioner specially appointed by the commissioners for that purpose at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons so to be impannelled, summoned, and returned, a jury of twelve men shall be drawn by the said assistant-commissioner, or by some person

to be by him appointed, in such manner as juries for trials of issues joined in her Majesty's courts of record at *Westminster* are by law directed to be drawn; and in case a sufficient number of jurymen shall not appear at the time and place so to be appointed as aforesaid, such sheriff shall return other honest and indifferent men of the standers-by, or of others that can speedily be procured to attend that service, (being so qualified as aforesaid,) to make up the said jury to the number of twelve; and all parties concerned may have their lawful challenges against any of the said jurymen, but shall not challenge the array; and the said assistant-commissioner is hereby empowered and required to summon before him all persons who shall be thought necessary to be examined as witnesses touching the matter in question, and may authorize or order the said jury, or any six or more of them, to view the boundaries, or the part thereof which is in controversy; and such jury shall upon their oaths, or being Quakers upon their affirmations (which oaths and affirmations, as well as the oaths and affirmations of all such persons as shall be called upon to give evidence, the said assistant-commissioner is hereby empowed and required to administer), inquire into and ascertain the said boundaries, or such part thereof as shall have been in controversy, and shall declare whether the said

boundaries, as described and set out and published as aforesaid, are or are not the true boundaries of the respective parishes and manors respectively, and in case they shall declare that the same are not the true boundaries, then shall declare in what manner the boundaries so described and set out and published as aforesaid ought to be amended, and shall give verdict accordingly; and the assistant-commissioner shall reduce such verdict to writing, and certify the same to the commissioners, under his hand and seal; and in case such jury shall have declared that the boundaries so described and set out and published as aforesaid ought to be amended, the commissioners shall amend the same in accordance with such verdict, and such amended boundaries shall thenceforth be conclusive on all persons whomsoever.*

Non-attendance of jurymen.

XL. And be it enacted, that if any person so summoned and returned upon any such jury as aforesaid shall not appear, or appearing shall refuse to be sworn, or being a Quaker to make affirmation, or shall refuse to give his verdict, or shall in any other manner wilfully neglect his duty, contrary to the true intent

* By the 12 & 13 Vict. c. 83, s. 1, the valuer may by his award declare the boundary of the parishes so far as it runs through lands which are the subject of his award, where there is no existing dispute upon the subject.

and meaning of this Act, or if any person so summoned to give evidence as aforesaid shall not appear, on being paid or tendered a reasonable sum for his costs and expenses, or appearing shall refuse to be sworn, or being a Quaker affirmed, or to give evidence, every person so offending, having no reasonable excuse, to be judged of and determined by the said assistant-commissioner, shall forfeit and pay for every such offence any sum not exceeding ten pounds; all which said penalties and forfeitures shall and may be recovered as penalties and forfeitures are recoverable under this Act.

Juries subject to same regulations as if returned for any court at Westminster.

XLI. And be it enacted, that every such jury and jurymen as aforesaid shall also be subject to the same regulations, pains, and penalties as if such jury and jurymen had been returned for the trial of any issue joined in any of her Majesty's courts of record at Westminster.

Costs of appeal.

XLII. And be it enacted, that in every case in which the verdict of a jury shall be given in favour of the person who shall have requested that such jury be summoned, all the costs of summoning such jury and the expenses of witnesses shall be defrayed by the commissioners, and shall be expenses in the inclosure in the matter of which the question shall have

arisen, and such costs and expenses shall be settled and determined by the said assistant-commissioner as aforesaid; but if the verdict of the jury shall be given against such person, the said costs and expenses shall be defrayed by such person; and in case such costs and expenses shall not be paid to the party entitled to receive the same within ten days after the same shall have been demanded, then the same shall and may, by warrant of the commissioners, directed to any person or persons whomsoever, be levied by distress; but in case such person shall have requested such jury to be summoned in pursuance of a resolution of the rate-payers of any parish in vestry assembled, the costs and expenses so paid by him shall be repaid to him by the overseers of the poor of such parish, out of the poor's rate, and shall be allowed in account to such overseers.

Security for costs to be taken by the commissioners.

XLIII. And be it enacted, that every person who shall be dissatisfied, and shall require a jury to be summoned as aforesaid, shall at his own costs, before the commissioners shall be obliged to issue their warrant for the summoning of such jury, enter into a bond, with two sufficient sureties, to the commissioners, in a sufficient penalty, to prosecute the complaint, and to bear and pay their costs and expenses of summoning and returning such jury, and taking such verdict, and of the summon-

ing and attendance of witnesses, in case the said costs and expenses shall fall upon them.

Persons dissatisfied with determination of commissioners may appeal to Court of Queen's Bench.

XLIV. And be it enacted, that any person interested in the determination of the said commissioners or assistant-commissioner respecting the said boundaries, who shall be dissatisfied with such determination, and who shall, within the time hereinbefore limited, have given to the commissioners notice in writing of his intention to apply to the Court of Queen's Bench, as hereinbefore mentioned, may, within six calendar months next after publication of the said boundaries, move the Court of Queen's Bench to remove the said determination of the commissioners or assistant-commissioner by certiorari into the said court, the party making such application giving (in addition to such notice of his intention as aforesaid) eight days' notice of such application to the said commissioners; and in case of removal as aforesaid, the decision of the said court therein shall be final and conclusive as to the boundaries of such parish or manor; and after the expiration of the said term of six calendar months the determination of the commissioners or assistant-commissioner shall not be removed or removable by certiorari, or any other writ or process whatsoever, into any of her Majesty's courts of record at Westminster or elsewhere; and no certiorari shall be al-

lowed to remove such determination unless the party prosecuting the certiorari shall before allowance thereof enter into a recognizance before one of the justices of the said court in the sum of fifty pounds, with condition to prosecute the same without wilful delay, and to pay to the said commissioners their full costs and charges within one calendar month after the determination shall have been confirmed, to be taxed according to the custom of the court; and no determination of a jury under the provision hereinbefore contained shall be removed or removable by certiorari; and in every case in which any determination of the commissioners or of any assistant-commissioner, respecting the boundary of any parish or manor, shall be removed into the Court of Queen's Bench, it shall be lawful for the court to direct the trial of one or more feigned issues upon such points as the court shall think fit, and also to direct who shall be the plaintiff or plaintiffs, and who shall be the defendant or defendants, on such trial, or to determine the same in a summary manner, or otherwise dispose of the question or questions in dispute, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

Power to straighten boundaries.

XLV. And be it enacted, that for the purpose of shortening or rendering straight any

boundary fences between the land to be inclosed and any adjoining lands it shall be lawful for the valuer acting in the matter of any inclosure, with the consent in writing of the person interested in such adjoining lands, to set out and determine the boundaries between the land to be inclosed and such adjoining land, or to draw and define a new line of boundary, as he shall judge proper, for the purposes aforesaid; and after such boundaries shall have been so set out and determined as aforesaid, or such new line of boundary drawn and defined, the same shall be made, fenced, ditched, or mounded by such person, in such manner, and at such times as the valuer shall direct, and shall for ever thereafter be deemed the boundaries and limits of such respective lands.

Notices of Inclosure Meetings.

Valuer to hold meetings.

XLVI. And be it enacted, that the valuer acting in the matter of any inclosure shall from time to time hold such meetings for the examination of claims, and otherwise in the matter of such inclosure, as occasion shall require, and shall cause notice to be given on the church door, and also like notice to be given by advertisement, of the time and place of the meeting in the matter of such inclosure, and of each subsequent meeting, in the like

manner, fourteen days at least before such respective meeting (meetings by adjournment only excepted); and if from any cause the valuer shall think fit to adjourn or postpone any such meeting, it shall be lawful for him to adjourn or postpone such meeting to any future day.*

Claims.

Claims to be delivered in writing.

XLVII.† And be it enacted, that all persons claiming any common or other right or inter-

* By the Amendment Act, 10 & 11 Vict. c. 111, s. 7, this may be done without the attendance of the assistant-commissioner or the valuer.

† This clause is in a great measure adopted from the 6th sect. of the General Inclosure Act.

On that clause Mr. Coventry observes, "A non-compliance with this requisition will exclude the party from all participation in the lands to be divided, if the commissioners either casually or intentionally omit to make him any allotment." Such will be the case also under the Act now before us. The commissioners, indeed, have power to receive claims after the meeting for that purpose, but only for some special cause. It is probable that this power will be but sparingly exercised, otherwise the list of deposited claims will become useless for the purpose for which the deposit was directed.

Sir W. D. Evans observes upon the corresponding clause in the Act of George the Third, "The drawing a claim conformable to this clause requires a very considerable portion of technical accuracy; and I have in practice known many valuable rights defeated in consequence of the informality of the claim." 1 Evans on Stat. 29, n.

In a case where an allotment was made to a person in possession, but whose title was afterwards questioned,

est in any land proposed to be inclosed as aforesaid shall deliver such claims* in writing to the valuer acting in the matter of such inclosure, at such meeting as the valuer shall appoint for the purpose, stating the several particulars in respect whereof such claims are made, and distinguishing the claims in respect of freehold,† copyhold, customary, and leasehold property from each other, and mentioning therein the places of abode of the respective claimants, or their agents, at which notices in respect of such claims may be delivered; and no such claim shall be received by such valuer after the last meeting to be held for that purpose (of which notice shall be given), except

the person questioning the possessor's title had put in no written claim. The Court refused to acknowledge his right to the allotment, whether he had title to the old inclosure or not. Cov. on Incl. 141.

* It is essential that these claims be correctly drawn, as in cases of appeal they will become the terms of the feigned issue. Vide ante, p. 85. Some forms of claims have been appended, but it is not probable that they will meet all the cases that must arise under the act.

† By the Amendment Act, 11 & 12 Vict. c. 99, s. 9, it is enacted, that the valuer may receive claims which do not contain any of these particulars. But the place of abode of the claimant or his agent must appear upon the claim. This amendment however does not remove the necessity of having the claim put in legal language in all cases in which, from the amount of value involved, it is possible that the question will go to an issue—for the claim must still be the basis of the decision, and the decision will still be the basis of the issue. The amendment was introduced to give relief to very small claimants, whose claims were often found to be informal.

for some special cause, to be allowed by the commissioners.

Statement of claims to be deposited for examination.

XLVIII. And be it enacted, that a statement of all claims in the matter of any inclosure which shall have been delivered to the valuer acting in the matter of such inclosure, as hereinbefore provided, shall be made, and deposited by him at some public place within the parish in which the land to be inclosed, or the greater part thereof, shall be situate; and the valuer shall give notice on the church door of such parish and by advertisement of such statement having been deposited, and shall in such notice limit such time for the delivery of objections to claims as the commissioners under the circumstances of each inclosure shall think reasonable, and by order under their seal direct, or in case no direction shall have been given by the commissioners in this behalf, then such time as the valuer shall think reasonable, not being less in any case than twenty-one days after such notice shall have been given; and every person who shall object to a claim shall deliver his objection in writing to the valuer, and also deliver a copy of such objection at the place of abode of the claimant or his agent within the time limited for delivery of objections to claims as aforesaid; and no objection to any such claim shall be received by the valuer after the time so limited for the

delivery of objections to claims, unless for some special cause to be allowed by the commissioners; and after the time limited for the delivery of claims shall have expired the valuer shall cause fourteen days' notice to be given of the time and place of the meeting for the examination of such claims, and for the attendance of all parties concerned therein; and at such meeting the valuer shall proceed to examine into and determine such claims, and shall and may allow or disallow the same, in whole or in part, and make such order therein, as to him shall appear just; and in case any doubts or difficulties shall arise respecting such claims, or any differences shall happen between any of the claimants touching their respective claims, or the relative proportions of their rights and interests, the valuer shall determine the same, and shall make such order therein as to him shall appear just, which order shall be final, unless any party shall be dissatisfied with the determination of the valuer, and shall give notice, as hereinafter provided, of his desire to have the claim or matter heard and determined by the commissioners or an assistant-commissioner; or in case the commissioners shall think fit to revise such determination, under the power hereinafter contained: and in case the valuer, on the determination of any claim which shall have been objected to as aforesaid, or if any objec-

Claims to be heard and determined by valuer, subject to appeal to commissioners.

tion which shall have been made to any claim, shall see cause to award any costs, it shall be lawful for the valuer, upon application, to assess and award such costs as he shall think reasonable to be paid to the person in whose favour any determination shall have been made, and by the person whose claim or objection shall have been disallowed; and in case any person liable to pay such costs shall neglect or refuse to pay the same, upon demand, or within fourteen days thereafter, the valuer shall, by warrant under his hand and seal, directed to any person or persons whomsoever, cause such costs to be levied by distress; and if there shall be no goods or chattels whereon to levy such costs, it shall be lawful for the person in whose favour such costs shall be awarded to recover the same by action of debt or on the case, in which action it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum specified in the order of adjudication made by the valuer, and in consequence of such order, without setting forth any other proceedings under this Act: provided always, that the valuer may pay the expenses of any witnesses, or of the production of any writings, maps, plans, and surveys, or copies thereof, where such witnesses shall attend, or such maps, plans, surveys, or copies thereof shall be produced before such valuer, only on the

request and for the information or guidance of the valuer (and not on behalf of any party in difference), such last-mentioned expenses to be considered as part of the expenses of the inclosure.

Titles.

Titles not to be determined by valuer, commissioners, or assistant-commissioner.

XLIX. Provided also, and be it enacted, that nothing in this Act contained shall extend to enable the valuer, or the commissioners, or any assistant-commissioner, to determine the title of any lands, or to determine any right between any parties contrary to the actual possession of any such party (except in cases of encroachment as hereinafter mentioned), but in case the valuer, or the commissioners or assistant-commissioner, shall be of opinion against the rights of the party in possession, they or he shall forbear to make any determination thereupon until the possession shall have been given up by such party, or recovered from him in due course of law, or, where the circumstances shall admit, such valuer, or the commissioners or assistant-commissioner, may declare what right is appendant or appurtenant to any land or hereditament, or otherwise declare by any sufficient description the rights of the owner for the time being of any land or hereditament, without declaring by name who may be the actual owner of such land or hereditament.

Encroachments.

L. And be it enacted, that all encroachments and inclosures, other than inclosures duly authorized by the custom of any manor of which such land shall be parcel, or otherwise according to law, which shall have been made by any person, from or upon any part of the land proposed to be inclosed, within twenty years next before the first meeting for the examination of claims in the matter of the inclosure thereof, whether any amerciament, rent, or money payment or acknowledgment shall or shall not have been paid or made in respect of the same, to or for the use of the lord of the soil or any other person, shall be deemed parcel of the land subject to be inclosed, and shall be divided, allotted, and inclosed accordingly: provided always, that in case, under the circumstances of any such encroachments or inclosures, it shall appear to the commissioners just or reasonable that rights or interests in the lands to be inclosed should be allowed to the persons in possession of such encroachments or inclosures, it shall be lawful for the commissioners, either in the instructions to the valuer, or by any subsequent order under their seal, to direct what rights and interests, either absolute or for any limited terms or estates, should be allowed in

Encroachments within twenty years.

respect of such encroachments, and the valuer shall allow and declare such rights accordingly: provided also, that it shall be lawful for the several persons who shall be in possession of any such encroachments or inclosures, or in the receipt of the rent thereof, at the time of the determination of claims under this Act, to take down or remove all such buildings, fences, and other erections as shall then be thereon, and to convert the materials thereof to their own use, within two calendar months after notice in writing signed by the valuer given to such respective persons, or posted on the church door; and in case any dispute or difference shall arise touching any such encroachments or inclosures, or as to the extent thereof, such dispute or difference shall be determined by the valuer.

School-houses, &c., not to be deemed encroachments.

LI. Provided also, and be it enacted, that in case any such land shall have been taken or used, at any time before such first meeting for the examination of claims, for the erection of a school-house or the appurtenances thereto, or for other such purposes as in the opinion of the commissioners shall be charitable or parochial purposes, such land so taken or the erections made thereon, shall not be taken or deemed to be of the nature of an encroachment within the meaning of this Act; but where such land shall have been so taken for

the purposes aforesaid within twenty years next before such first meeting for the examination of claims, it shall be lawful for the commissioners, where it shall appear just and desirable for the purposes of inclosure, to direct that such land be deemed parcel of the land subject to be inclosed, and be divided, allotted, and inclosed accordingly, and that compensation be made to the persons in possession thereof, or to trustees for the purposes for which such land shall have been so taken or used, by adequate allotments of the land so to be inclosed.

Encroachments of twenty years' standing to be deemed ancient inclosures.

LII. Provided always, and be it enacted, that all lands which shall have been inclosed from any land subject to be inclosed under this Act for more than twenty years * next preceding the day of the first meeting for the examination of claims in the matter of such inclosure, shall for the purposes of this Act be deemed and taken to be ancient inclosures, but not so as to carry any right of common, or compensation or allotment for or in respect of right of common, which might be claimed in respect of ancient inclosures.

* The title to these encroachments is not affected by the Act. See Amendment Act, 10 & 11 Vict. c. 111, s. 3.

Rights of Toftowners.

Rights in respect of tofts to be allowed.

LIII. And be it enacted, that all tofts, foundations, or sites of ancient commonable messuages or cottages, shall, upon proof being made to the satisfaction of the valuer acting in the matter of any inclosure that commonable messuages or cottages formerly stood thereon, be deemed commonable messuages or cottages, and the respective proprietors thereof shall be entitled to the same compensation for the rights of common originally belonging thereto as if such messuages or cottages were still standing.

Enjoyment for Sixty Years constitutes a Right.

Rights not sustainable in law to be allowed upon proof of sixty years' usage.

LIV. And be it enacted, that where any claim shall be made to any right of common, or other right * which in the judgment of the

* A difficulty will probably arise upon the construction of this clause. The Courts have inclined to hold, that there is no such thing as a right of common not sustainable in law. See *Ivatt* v. *Mann*, 3 Scott, N. R. 364. In *Benson* v. *Chester*, 8 T. R. 396, the language of the conveyance was stronger than the language of this clause. The common was there conveyed to trustees in trust, to allow the commoners such user of the common as they had been accustomed to have; but the Court held that the word "user" must mean legal user.

If, on the other hand, it should be held that every user of sixty years' duration is legalized by this provision, many cases will doubtless occur in which commoners who have turned a greater number of cattle on the common

valuer, or of the commissioners or assistant-commissioner, could not be sustained in law, but proof shall be made to the satisfaction of the valuer, or of the commissioners or assistant-commissioner, that there has been enjoyment under the right so claimed for the space of sixty years or upwards next before the first meeting for the examination of claims in the matter of such inclosure, it shall be lawful for the valuer, or the commissioners or assistant-commissioner, to allow such claims, in such and the same manner as if the right so claimed might have been legally sustained and established.

Appeal from Valuer's Decision to Commissioners.

LV. And be it enacted, that after the valuer shall have heard and determined all claims

Schedule of claims allowed by

than their land will winter, will advance claims to allotments in proportion to the quantities of cattle they have actually turned on for sixty years past. This certainly was not the intention of the framers of the statute; but it is submitted that it will be difficult to draw distinctions between the claimants to the benefit of this provision. A. claims, as an inhabitant, an unlimited right to turn on upon the common. B. claims, as the possessor of an ancient tenement, a right to turn on thrice the number of cattle that his tenement will winter. Both have an user of sixty years. Both claims are bad in law; but if the claim of the inhabitant is included within the protection of this clause of the act, it seems difficult to understand how the claim of the surcharger can be excluded from it.

valuer to be made and deposited for inspection.

and objections which shall have been made in the matter of an inclosure he shall cause a schedule of such claims and objections, and of his determinations thereon, to be deposited, and to remain for thirty days at the least, for the inspection of all persons interested therein, at some public place within the parish in which the land to be inclosed, or the greater part thereof, shall be situate, and shall cause notice to be given on the church door of such parish, and by advertisement, of such deposit, and shall also send a copy of such schedule to the commissioners, and shall furnish any explanations or information in relation thereto to the commissioners, as they shall require;

Claims may be reheard by commissioners or an assistant-commissioner.

and in case any party dissatisfied with any determination of the valuer as aforesaid shall, within thirty days next after notice by the valuer of such deposit of the said schedule, cause to be delivered to the commissioners notice in writing of such dissatisfaction, and of the desire of such party to have the claim or matter so determined by the valuer heard and determined by the commissioners or by an assistant-commissioner, or in case the commissioners shall, on the representation of any persons interested in such inclosure, or on the information given by the valuer in relation to such schedule, be of opinion that all or any of the determinations of such valuer shall have been made without due consideration of the

legal rights of the parties interested, or shall be erroneous, then and in any such case the commissioners shall forthwith give notice, in such manner as they shall think fit, appointing some convenient place and time for holding a meeting to hear and determine the claim or matter which shall be so desired to be reheard, or all or any of the claims or matters which shall be mentioned in the said schedule, as the commissioners shall think fit; and the commissioners, or any assistant-commissioner specially empowered for that purpose, shall rehear and determine such claim or matter; and the determination of the commissioners or such assistant-commissioner shall be final and conclusive, and shall be binding on the valuer acting in the matter of such inclosure, unless any party dissatisfied therewith shall try his right by an issue at law, as hereinafter provided.

Appeal from Commissioners' Decision to a Court of Law by feigned Issue.

LVI. Provided always, and be it enacted, that if any person claiming to be interested in any land proposed to be inclosed under this Act shall be dissatisfied with any determination of the commissioners or assistant-commissioner concerning any claim or interest in or to the land proposed to be inclosed under the

Appeal against determination of the commissioners.

powers hereinbefore contained, and shall cause notice in writing of such dissatisfaction to be delivered to the commissioners within thirty days next after notice of such determination shall have been given to the several parties or persons specially interested, if any such there be, it shall be lawful for such person so dissatisfied, and giving such notice as aforesaid, to bring an action upon a feigned issue against the person in whose favour such determination shall have been made, or against the commissioners, and to proceed to a trial at law at the then next assizes, or at the assizes immediately following such next assizes, to be holden for the county wherein the land relating to which such dispute shall arise shall be situate; and the defendant in such action shall, upon being served with the usual process therein, appear thereto, and accept one or more issue or issues, whereby such claim, and the right and interest thereby insisted upon, may be tried and determined, such issue to be settled by the proper officer of the court in which the said action shall be commenced, in case the parties shall differ about the same; and the verdict given upon the trial of such action shall be binding and conclusive upon all parties thereto, unless the court wherein such action shall be brought shall set aside such verdict, and order a new trial to be had; and after such verdict shall be given, and final judgment obtained thereon,

the commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined according to the event of such trial; and the costs attending any such action shall abide the event of the trial.

Determination of commissioners not appealed against conclusive.

LVII. Provided always, and be it enacted, that if no such notice of dissatisfaction shall be given, or if no such action at law shall be commenced as aforesaid, or if any such action shall be commenced, and the plaintiff therein shall not proceed to trial within the time hereinbefore limited for that purpose, unless the court for sufficient cause put off the trial, then the determination of the said commissioners or assistant-commissioner shall be final and conclusive.

Actions not to abate.

LVIII. And be it enacted, that if any person, plaintiff or defendant in any action to be brought as aforesaid, shall die pending the same, such action shall not abate by reason thereof, but may be proceeded in as if no such event had happened, the heir or devisee, or other person entitled to the interest of the deceased party in the matter in question, being served with process in the action; and if any person in whose favour such determination as aforesaid shall have been made, and against whom any such action might have been brought if living, shall die before any action brought,

it shall be lawful for the person who might have brought such action to bring the same, within the time so limited as aforesaid, against such person as if actually living, and to serve the commissioners with process for commencing such action, in the same manner as the deceased person might have been served therewith if living, and it shall thereupon be incumbent on the commissioners to serve with such process the heir or devisee or personal representative of the deceased person, or other the person who shall claim the benefit of such determination as aforesaid; and on such process being served such heir or devisee or personal representative, or other person, shall appear and defend such action in the name of the person so dead, and proceedings shall be had therein in the same manner as if such person had been living, and the rights, interests, and claims of all parties shall be equally bound by the event of any action so brought or continued as aforesaid as if the death of any of the persons interested therein had not occurred.

Costs.

Commissioners may award costs.

LIX. And be it enacted, that in case the commissioners, or any assistant-commissioner appointed to hear and determine any claim or matter in pursuance of this Act, shall see

cause to award any costs, it shall be lawful for the commissioners or assistant-commissioner, upon application, to assess and award such costs as they or he shall think reasonable to be paid to the person in whose favour any determination of the commissioners or assistant-commissioner shall have been made, and by the person whose claim or objection shall have been disallowed; and in case any person liable to pay such costs shall neglect or refuse to pay the same upon demand, or within fourteen days thereafter, the commissioners or assistant-commissioner shall, by warrant directed to any person or persons whomsoever, cause such costs to be levied by distress; and if there shall be no goods and chattels whereon to levy such costs it shall be lawful for the person in whose favour such costs shall be awarded to recover the same by action of debt or on the case, in which action it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum specified in the order of adjudication made by the commissioners or assistant-commissioner, and in consequence of such order, without setting forth any other proceedings under this Act.

Submission to Arbitration.

LX. Provided always, and be it enacted, that in case any person hereinbefore authorized

Differences may be submitted to arbitration.

to bring an action upon a feigned issue, and the person against whom such action might be brought, shall be desirous of submitting the matter in dispute or difference to the arbitration of any arbitrator, or of any arbitrators and umpire, it shall be lawful for such persons to submit such matter in dispute accordingly, and such submission shall be irrevocable, and the decision thereupon shall be binding on both parties, and be obeyed accordingly, and the costs of such arbitration shall abide the event; and the commissioners may require each of the persons in difference upon any such submission to arbitration to give such security for the payment of the costs of such arbitration as the commissioners shall think fit.

Powers of Valuer.

Power to valuer to make water-courses, &c.

LXI. And be it enacted, that it shall be lawful for the valuer acting in the matter of any inclosure to set out and make such common ponds, ditches, watercourses, embankments, tunnels, and bridges, of such extent and form and in such situations as he shall deem necessary, and as shall not be inconsistent with the terms and conditions and instructions hereinbefore mentioned, in the land to be inclosed, and also to enlarge, cleanse, or alter the course of and improve any of the

existing ditches or watercourses, embankments, tunnels, or bridges, as well in and over the same land as also in any ancient inclosures or other lands in the parish or respective parishes in which the land to be inclosed may be situate, as the valuer shall deem necessary, making such satisfaction to the proprietors of such ancient inclosures or lands, for the damage done thereby, as the valuer shall think just; and the expense of making and enlarging, altering and cleansing such ponds, ditches, watercourses, embankments, tunnels, and bridges, when the same shall be first done in pursuance of this Act, if not otherwise provided for, shall be raised and paid in the same manner as the other expenses of the inclosure; but all such ponds, ditches, watercourses, embankments, tunnels, and bridges shall at all times afterwards be repaired, cleansed, and maintained by such persons and in such manner as the valuer shall direct; provided that no watercourse be diverted or turned without the consent in writing of the person interested in the land from which the same may be diverted, and of the person interested in the lands into which the same may be turned, or to the prejudice of any person interested in such watercourse, except with his consent in writing; and that no ditch or watercourse, embankment, tunnel, or bridge, be enlarged or altered on any land other than the land to

be inclosed, without the consent in writing of the person interested in such land.

Power to alter roads and ways.

LXII. And be it enacted, that in the first place the valuer acting in the matter of any inclosure shall and may, before he shall proceed to make any of the divisions and allotments of the land to be inclosed in pursuance of or in any manner not inconsistent with the instructions given to such valuer as aforesaid, set out and make public roads and ways, and widen public roads and ways, in or over the land to be inclosed, and stop up, divert, or alter any of the roads or ways passing through the land to be inclosed, or through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate; and the soil of such of the roads and ways so to be discontinued and stopped up as pass through the lands to be inclosed shall be deemed part of the lands to be inclosed: provided always, that nothing herein contained shall authorize the altering or diverting any turnpike road, unless the consent of the majority of the trustees of such turnpike road, assembled at a public meeting called for that purpose, be first obtained: provided also, that before any public road or way shall be discontinued, diverted, stopped up, or altered by the valuer acting in the matter of any inclosure, the valuer shall cause to be affixed at each end

of such road or way a notice to the effect that the same is intended to be discontinued, stopped up, diverted, or altered, as the case may be, from and after a day to be mentioned in such notice; and the valuer shall also cause the same notice to be given by advertisement for four successive weeks, and also on the church door on the four Sundays of the said four successive weeks; and after the said several notices shall have been so given such road or way shall, from and after the day in such notice mentioned, be deemed to be discontinued, stopped up, diverted, or altered, as the case may be, subject, however, to such appeal as is hereinafter mentioned.

Appeal to Quarter Sessions.

LXIII. And be it enacted, that it shall be lawful for any person, within four months after the first Sunday on which such notice shall have been given on the church door of the intention that such road or way should be discontinued, stopped up, diverted, or altered, as the case may be, to make his complaint thereof by appeal to the justices of the peace at the quarter sessions for the county, riding, division, or other jurisdiction in which such road or way, or the greater part thereof, shall be situate, upon giving to the valuer fourteen days' notice in writing of such appeal, together

Appeal to quarter sessions.

with a statement in writing of the grounds thereof; but it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been given as aforesaid, nor on any hearing of appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid.

Trial of appeal.

LXIV. And be it enacted, that in case of such appeal the justices at such quarter sessions shall, for the purpose of determining whether such public road or way shall be discontinued, stopped up, diverted, or altered, or whether the party appealing would be thereby injured or aggrieved, impannel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions; and if, after hearing the evidence produced before them, the said jury shall return a verdict that such road or way is unnecessary, or may beneficially to the public be discontinued, stopped up, diverted, or altered, and that the party appealing would not be injured or aggrieved thereby, then the said court shall dismiss such appeal, and shall award the costs of resisting the said appeal to be paid by the appellant to the valuer, and the same shall be recoverable in the same manner as any penalties and forfeitures are recoverable under this Act; but if the said jury shall return a verdict that such

road or way is not unnecessary, and that the same could not beneficially to the public be so discontinued, stopped up, diverted, or altered, or that the party appealing would be injured or aggrieved thereby, the said court shall allow such appeal, and such public road or way shall not be discontinued, stopped up, diverted, or altered; or in case the same shall have been discontinued, stopped up, diverted, or altered, the said court shall make an order restoring the same to its original state, and shall award to the appellant the costs of prosecuting such appeal, and such costs shall be paid by the said valuer out of the moneys to be raised for the expenses of the inclosure: provided always, that in every case in which any such appeal as aforesaid shall be made by the surveyor of the highways of any parish or place, under the direction of the inhabitants of such parish in vestry assembled, or, where there shall be no vestry meeting in such place, under the direction of the inhabitants contributing to highway rates assembled at any meeting of which fourteen days' notice shall have been given by advertisement and on the church door, then, although such appeal shall be dismissed, the costs of prosecuting such appeal, and also such costs as shall be awarded to be paid by the appellant to the valuer, shall be paid out of the highway rate of such parish or place.

Public Roads.

Roads to be fenced.

LXV. And be it enacted, that such public carriage roads so to be set out as aforesaid shall be well and sufficiently fenced on both sides, by such of the persons interested in the land to be inclosed, and within such time, as the valuer acting in the matter of such inclosure shall direct; and the valuer shall form and complete such parts of the said public roads and ways as shall be newly made; and every such public road and way to be set out and made under this Act, shall be of the width required by the Act of the sixth year of King William the Fourth, intituled "An Act to consolidate and amend the Laws relating to Highways in that part of Great Britain called England," for a road or way of the like description, which may be dedicated to the use of the public.

5 & 6 W. 4, c. 50.

Expenses of making and altering roads.

LXVI. And be it enacted, that the expenses attending the purchasing of the soil of all such public roads and ways as aforesaid, and the making, the stopping up, discontinuing, diverting, widening, and altering of such roads and ways, and the money compensation in respect thereof, upon any inclosure, shall be paid in such manner as the expenses of such inclosure shall be directed to be paid.

Roads to be repaired by the parish after certificate by two justices of the peace.

LXVII. And be it enacted, that when and so soon as two or more of her Majesty's justices of the peace for the county, riding, division, or jurisdiction in which the lands to be inclosed shall be situate, shall certify any of the public roads and ways to be set out in pursuance of this Act on any inclosure to be sufficiently formed and completed, such roads shall thenceforth be kept in repair by such persons and in such manner as the public roads within the said parish are or ought by law to be kept in repair; and every such certificate shall, at the quarter sessions of the peace to be holden for the said county, riding, division, or jurisdiction next after the date thereof, be filed of record by the clerk of the peace.

*Private Roads.**

Private roads.

LXVIII. And be it enacted, that the valuer acting in the matter of any inclosure shall and may set out such private or occupation roads and ways through the lands to be inclosed as he shall think requisite, for the use of the persons interested in such lands or any of them; and any expenses which the valuer may

* The powers of the valuer as to setting out private roads are extended by the 11 & 12 Vict. c. 99, ss. 4, 5, 6, 7, and rates may be made for maintaining such roads; and also common ponds, ditches, watercourses, embankments, tunnels, and ditches.

incur relative to the setting out or formation or completion of such private roads and ways, or any of them, shall, unless the valuer shall otherwise direct, be paid in the same manner as the other expenses of the inclosure; and such expenses of the formation and completion of such private roads and ways as the valuer shall direct shall be borne by, and after the formation and completion of such private roads and ways the same shall be maintained and kept in repair by, and at the expense of, the owners and proprietors for the time being of the land inclosed, or such of them, and in such shares and proportions and in such manner as the valuer shall direct; and after such private roads and ways shall have been set out and made, the grass and herbage arising thereon shall for ever belong to and be for the use of such persons interested in the lands to be inclosed as the valuer shall direct, and in the absence of such direction shall belong to the proprietors of the land to be inclosed which shall next adjoin the said roads and ways on either side thereof as far as the crown of the road: and after such setting out as aforesaid all private or occupation roads or ways over, through, and upon the lands to be inclosed which shall not be set out as aforesaid, shall be for ever stopped up and extinguished.

Powers of Valuer.

LXIX. And be it enacted, that it shall be lawful for the valuer acting in the matter of any inclosure, before the making of the award, when the commissioners shall think necessary for the purpose of the inclosure, and by order under their seal authorize or direct, by notice on the church door to order all or any part of the rights of sheepwalk, common or other rights, in or over the land to be inclosed or any part thereof, to be extinguished from such time or the exercise thereof to be suspended during such time as shall be expressed in such notice, and from the time mentioned in such notice such rights shall be extinguished or suspended accordingly: and if during the suspension or after the extinguishment of any such rights of sheepwalk, common or other rights as aforesaid, any person shall permit his horses, cattle, sheep, or swine to go or depasture upon any of the lands over which such rights shall be suspended or extinguished, it shall be lawful for the valuer acting in the matter of the inclosure, or any other person by his order (testified in writing under his hand), or any of the persons interested in such lands or in the inclosure thereof, to distrain such horses, cattle, sheep, or swine, being upon such lands contrary to such order, and to im- Rights of common may be suspended.

pound the same until the person so offending shall pay to the person so distraining such sum of money as the valuer shall by writing under his hand have previously ordered, not exceeding ten shillings for each horse or head of cattle, and five shillings for each sheep or swine so distrained; and in case the same shall not be paid within seven days after the same shall have been impounded, the valuer is hereby authorized to recover the same by way of penalty, as hereinafter mentioned.*

Course of husbandry may be directed.

LXX. And be it enacted, that it shall be lawful for the valuer acting in the matter of any inclosure, at such time as he shall think fit, by notice on the church door, to direct the course of husbandry and the stint or rule of stocking that shall be observed upon the land to be inclosed, until the time when the inclosure thereof shall be completed, as well with respect to the laying down, ploughing, sowing, fallowing, manuring, and tilling thereof, as to the stocking and feeding of the commonable lands and fallows or stubbles upon the same, and to direct such recompence to be made as he shall think right to any person injured by

* Remedies against trespassers are given by the Amendment Act, 11 & 12 Vict. c. 99, s. 10; and by s. 11, persons having taken possession of allotment may maintain an action for damage. A further remedy against persons committing acts of ownership is given by 12 & 13 Vict. c. 83, s. 10.

such directions, all which directions shall be binding upon all parties interested, their farmers and tenants; and the valuer shall impose such pecuniary penalties on every person not conforming to such directions as he shall think necessary, not exceeding the sum of five pounds *per* acre in the case of cross-cropping, or withholding from the land its due proportion of manure, or ten pounds in any other case, for any one offence, and shall also determine, in all cases where the tenant is entitled by agreement or custom to the manure arising from the lands in his occupation, by whom and in what sum of money such tenant shall be compensated for any such manure left or given up by him; and such penalties and other sums of money shall be recovered in the same manner as by this Act directed for the recovery of penalties.

Compensation for growing crops.

LXXI. And be it enacted, that the valuer acting in the matter of any inclosure shall by writing under his hand order what recompence in money shall be made to the owner of any crops growing, according to his agreement or lease, or according to the customary mode of cultivation within the parish in which the land to be inclosed shall be situate, upon such land, at the time of the division, allotment, and inclosure, for the said crops, by the person to whom the land on which such crops

are growing shall be allotted, and also what recompence in money shall be paid, and by whom, to any tenant or occupier of land, as well for the ploughing, tilling, cultivating, manuring, or folding any land to be inclosed, for the benefit accruing thereby to the person to whom such land shall be allotted, or for any loss or disadvantage which any tenant or occupier may sustain by the loss of his following or way-going crops upon the land to be inclosed; and if in any of the said cases the money to be paid for such recompence be not paid at the time and in the manner ordered by the valuer, then the same may be recovered by the person entitled thereto, from the person liable to pay the same, in the same manner as penalties and forfeitures are recoverable under this Act.

Allotment for repair of roads.

LXXII. And be it enacted, that the valuer acting in the matter of any inclosure shall allot to the surveyor of the highways for the time being of the parish in which the land proposed to be inclosed, or any part thereof, shall be situate, and to his successors for ever, such part of the land proposed to be inclosed as by the instructions given to such valuer shall have been directed to be appropriated for supplying stone, gravel, or other materials for the repairs of roads and ways, as aforesaid, or in case no such instructions shall have been

given in this behalf, and the valuer shall think an allotment necessary for the purposes aforesaid, such part as the valuer shall think fit; and such allotments shall be inclosed and fenced as the valuer shall direct, and shall from the confirmation of the award be vested in the surveyor of the highways within the said parish for the time being, in trust for the purposes aforesaid; and the grass and herbage of such allotments shall belong to such persons as by the valuer shall be directed; and if he shall make no such direction, then such surveyor shall from time to time let any such allotment, reserving the right to get and take away such stone, gravel, and other materials when and as he shall think fit, for the most money that can be obtained for the same, and shall apply the rents and profits towards the repairs of the public roads or highways within the said parish; and the said surveyor shall account for such rents and profits in the same manner as he is by law accountable for other moneys that shall come to his hands in the capacity of surveyor of the highways, and shall be subject to the like penalties for the neglect thereof.

Allotments for public purposes.

LXXIII. And be it enacted, that the valuer acting in the matter of any inclosure shall and may, in pursuance of the directions of or in any manner not inconsistent with the direc-

with a statement in writing of the grounds thereof; but it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been given as aforesaid, nor on any hearing of appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid.

Trial of appeal.

LXIV. And be it enacted, that in case of such appeal the justices at such quarter sessions shall, for the purpose of determining whether such public road or way shall be discontinued, stopped up, diverted, or altered, or whether the party appealing would be thereby injured or aggrieved, impannel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions; and if, after hearing the evidence produced before them, the said jury shall return a verdict that such road or way is unnecessary, or may beneficially to the public be discontinued, stopped up, diverted, or altered, and that the party appealing would not be injured or aggrieved thereby, then the said court shall dismiss such appeal, and shall award the costs of resisting the said appeal to be paid by the appellant to the valuer, and the same shall be recoverable in the same manner as any penalties and forfeitures are recoverable under this Act; but if the said jury shall return a verdict that such

road or way is not unnecessary, and that the same could not beneficially to the public be so discontinued, stopped up, diverted, or altered, or that the party appealing would be injured or aggrieved thereby, the said court shall allow such appeal, and such public road or way shall not be discontinued, stopped up, diverted, or altered; or in case the same shall have been discontinued, stopped up, diverted, or altered, the said court shall make an order restoring the same to its original state, and shall award to the appellant the costs of prosecuting such appeal, and such costs shall be paid by the said valuer out of the moneys to be raised for the expenses of the inclosure: provided always, that in every case in which any such appeal as aforesaid shall be made by the surveyor of the highways of any parish or place, under the direction of the inhabitants of such parish in vestry assembled, or, where there shall be no vestry meeting in such place, under the direction of the inhabitants contributing to highway rates assembled at any meeting of which fourteen days' notice shall have been given by advertisement and on the church door, then, although such appeal shall be dismissed, the costs of prosecuting such appeal, and also such costs as shall be awarded to be paid by the appellant to the valuer, shall be paid out of the highway rate of such parish or place.

as shall have been thereby respectively directed to be set apart for such purposes, and such allotments shall be made to such persons respectively, with such regulations and provisions as to the fencing, maintenance, use, and enjoyment thereof respectively, as the valuer, with the approbation of the commissioners, shall direct; and in every case in which the valuer, with such approbation of the commissioners, shall not think it necessary or proper to direct the same to be otherwise made, such allotments shall be made to the churchwardens and overseers of the poor for the time being of the parish in which such allotments shall be situate; and all allotments which shall be made to the churchwardens and overseers under this Act shall be held by the churchwardens and overseers of the poor for the time being in the same manner and with the same legal powers and incidents as if the same allotments were lands belonging to the parish, but in trust nevertheless for the purposes for which the same shall be allotted, and subject, as to the said allotment for the labouring poor, to the provisions in relation thereto hereinafter contained, and as to all other such allotments, subject to such directions for the maintenance, fencing, management, and use thereof as the valuer, with the approbation of the commissioners, may think fit.*

* See the first Amendment Act, 9 & 10 Vict. c. 70, s. 4.

Allotments for Exercise and Recreation.

LXXIV. Provided always, and be it enacted, that it shall be lawful for the valuer, with the approbation of the commissioners, to set out and allot such land as shall be appropriated as a place of exercise and recreation as aforesaid to any person entitled to an allotment under the inclosure, and who shall consent to receive the same in full or in part of his allotment; and the person to whom the land so to be appropriated shall be allotted, and all future owners thereof, shall, unless it shall be otherwise directed by the award, be subject to the obligation of maintaining the fences of such land, and of preserving the surface thereof in good condition, and of permitting such land to be at all times used for exercise and recreation by the inhabitants of the parish and neighbourhood, and, subject to such obligations, the herbage of such land shall belong to the person to whom such land shall be so allotted.

Provision for awarding allotments for exercise to individuals, subject to the obligation of permitting it to be used.

Allotments for Labouring Poor.

LXXV. And be it enacted, that every allotment which shall be made and awarded for the labouring poor may be so awarded subject to and chargeable with a clear rent-charge, or clear rent-charges, not exceeding in the whole

Allotments for the labouring poor may be made, subject to a corn rent-charge, to vary and be

recoverable as a tithe rent-charge.

the net annual value of the allotment in its actual condition at the time of making the same; and every such rent-charge shall be deemed at the time of the confirmation of the award to be of the value of such number of imperial bushels and decimal parts of an imperial bushel of wheat, barley, and oats, as the same would have purchased at the average prices during the seven years ending on the Thursday next before Christmas-day one thousand eight hundred and thirty-five, as the same were ascertained by the advertisement inserted in the *London Gazette* under the provisions of the Act of the seventh year of King William the Fourth, intituled "An Act for the Commutation of Tithes in *England* and *Wales*," in case one third part of such rent-charge had been invested in the purchase of wheat, one third part thereof in the purchase of barley, and the remaining third part thereof in the purchase of oats, and the respective quantities of wheat, barley, and oats so ascertained shall be stated in the award; and every such rent-charge shall be paid by equal half-yearly payments on the first day of July and on the first day of January, the first of such half-yearly payments to be made on the first of such half-yearly days after the expiration of three years from the date of the confirmation of such award; and such sum of money shall be payable in respect of such yearly rent-

6 & 7 W. 4, c. 71.

charge as according to the prices ascertained by the then next preceding advertisement for the purposes of the said Act of the seventh year of King William the Fourth would have been payable in respect of a rent-charge of like amount charged on lands under the provisions of such Act; and the sum of money thenceforth payable in respect of such rent-charge charged under the provisions of this Act, shall vary so as always to consist of the price of such number of bushels and decimal parts of a bushel of wheat, barley, and oats, respectively, according to the next preceding advertisement for the time being, in like manner as if the same had been a rent payable under the provisions of the said Act of the seventh year of King William the Fourth; and the persons entitled to any rent-charge charged under the provisions of this Act shall have the same powers and remedies for enforcing payment thereof in all respects as are by the said Act of the seventh year of King William the Fourth, or by any Act for amending the same, given to the persons entitled to rent-charges charged under the said Act of the seventh year of King William the Fourth for recovering and enforcing payment of such last-mentioned rent-charges; and nothing herein or in such award contained shall render any person personally liable to the payment of any rent-charges to be charged under the provisions of this act:

provided always, that when such allotment, or any part thereof, shall be let and occupied as gardens under the provisions hereinafter contained, the person for the time being entitled to the rent-charge charged thereon shall not distrain for such rent-charge on the occupiers of such gardens, but the person so entitled may, in case such rent-charge shall be in arrear, give notice to the occupiers of such gardens, and to the allotment wardens, or any of them, and shall thenceforth, until the arrears of such rent-charge, with all expenses occasioned by the non-payment thereof, shall be fully paid, be entitled to receive all the rent which, after such notice, shall accrue, in respect of such gardens, and shall have the same remedies for recovering such rent, and the same powers of determining the tenancy of such occupiers, and of letting and dealing with such allotment, as such allotment wardens would have had in case such rent-charge had not been in arrear; and in case the said allotment wardens, or any of them, after such notice shall have been given to them as aforesaid, and before the arrears of such rent-charge, with all such expenses as aforesaid, shall have been fully paid, shall receive any rent from the occupiers of such gardens, such of the allotment wardens as shall have received such rent shall, on demand, pay to the person then entitled thereto the arrears of the said rent-charge

then remaining unpaid, and the expenses occasioned by the non-payment thereof; and in default of such payment, on demand, such arrears of rent-charge and expenses may be recovered from the allotment wardens liable to pay the same as penalties are recoverable under this Act.

*Allotment to Lord.**

Allotment to the lord of the manor.

LXXVI. And be it enacted, that after the several allotments hereinbefore directed shall have been set out and made, and after making provision for the payment of the expenses by sale of land, in case the expenses shall be so directed to be paid, the valuer acting in the matter of any inclosure shall allot and award unto the lord of the manor so much and such part of the land proposed to be inclosed as shall in the judgment of the valuer be equal (quan-

* It is much to be regretted that the act does not contain a provision authorizing the commissioners to give the lord of the manor, instead of an allotment, a rent-charge issuing out of the land to be inclosed. At present the act imposes an outlay of capital upon the lord, often a tenant for life, in bringing his allotment into cultivation—no slight temptation to him to exercise his veto upon the inclosure.

This note stood thus in the first edition; but by the Amendment Act of 1846 (9 & 10 Vict. c. 70, s. 5) it is now provided that the commissioners may, by their provisional order, make it a condition that the lord of the manor shall have a rent-charge instead of an allotment. See this statute, *post*.

tity and value considered) to such a part of the residue of such land as shall be proportioned to his right or interest therein, according to the directions of the provisional order of the commissioners, in lieu of his right and interest in the soil of the said land, exclusive of any other allotments which may be made to such lord in lieu of or in satisfaction for any other rights or interests in such land to which he may be entitled, and which shall not have been included in the estimate in such provisional order of his right and interest;* and in case it shall have been declared by such provisional order that the right or interest of the lord has been estimated exclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under the land to be inclosed, then the valuer shall and may, on the request in writing of the lord, reserve or award to the lord such rights and easements for searching for, working, and carrying away such mines, minerals, stone, or other substrata which shall not have been included in such estimate of his right and interest, subject to such provisions for compensation for damage to be done to the surface in the exercise of such rights and easements, as by the valuer, with the approbation of the commissioners,

* By the 12 & 13 Vict. c. 83, s. 5, the lord's right to quit-rents, chief-rents, and heriots, may be extinguished by allotment.

shall be thought reasonable, and as shall not be inconsistent as to the terms of such provisional order.

Allotments to Commoners.

Allotment of residue.

LXXVII. And be it enacted, that after the several allotments hereinbefore directed shall have been set out and made, and after making provision for all or any part of the expenses of the inclosure by sale of lands, in case all or any part of the expenses shall be so directed to be paid, the valuer acting in the matter of the inclosure shall divide, allot, and award all the remainder of the land to be inclosed unto and amongst the several persons who shall be interested therein, in such shares and proportions as he shall adjudge and determine to be proportionate to the value of their respective rights and interests which shall have been claimed and allowed under the provisions hereinbefore contained.*

The rent-charges payable out of allotments for the labouring poor to be allotted to persons en-

LXXVIII. And be it enacted, that where any allotments shall be made for the labouring poor, under the provisions hereinbefore contained, subject to any rent-charge or rent-charges, such rent-charge or rent-charges may

* Allotments of less than five pounds value may be compensated in money; see 11 & 12 Vict. c. 99, s. 3, *post.*

titled under the inclosure.

be allotted to any person or persons who may elect to receive the same in full or in part of his or their allotment or allotments; and in case no person shall so elect to receive the same, then to such persons and in such shares as the valuer may think convenient, for the purpose of equalizing allotments or otherwise; and it shall be lawful for the valuer, for the purposes of allotment under this clause, to estimate the value in fee simple of every such rent-charge to be four-fifths only of the value of an allotment of land equal in net annual value to such rent-charge.

Separate allotments to be made in respect of separate titles.

LXXIX. And be it enacted, that when any person to whom any allotment shall be made or land assigned in exchange by virtue of this Act shall hold such land, or the land in respect of which such allotment or exchange is made, under different titles or for different estates, and as to copyhold or customary land, by separate quit-rents, the valuer in the matter of the inclosure shall ascertain and distinguish the land held for each of such estates and under each of such titles respectively, and shall accordingly set out distinct and several allotments for such respective lands, and distinguish the several estates holden by several and distinct quit-rents.

Several allotments

LXXX. And be it enacted, that in case any

number of the persons interested in the land to be inclosed shall desire to have their allotments thrown together, and distinguished by metes and bounds, but not fenced from each other, and of such their desire shall give notice in writing to the valuer acting in the inclosure, such valuer shall set out the several allotments of such persons so giving notice as aforesaid by metes and bounds, but in one parcel of land, and without requiring them to make any subdivision fences or other fences, save such ring or outer fences as may be necessary, or as the valuer may direct to be made, for dividing the said parcel of land from the residue of the land so to be inclosed. may by consent be laid together.

LXXXI. Provided always, and be it enacted, that it shall not be lawful for the said valuer to allot to any other person than the proprietor thereof any land (other than encroachments and inclosures not authorized by law, made within twenty years next before the first meeting for the examination of claims, as aforesaid) which may be cultivated as orchard or garden, or on which any building may have been erected, or which may have been inclosed by virtue of any agreement between the proprietor thereof and the persons having right of common over the same, without the consent in writing of such proprietor. Cultivated land and buildings to be allotted to the proprietor.

Regard to be had to the situation of homesteads.

LXXXII. And be it enacted, that the valuer, in making the several allotments hereby directed, shall have due regard as well to the situation of the respective houses or homesteads of the persons interested in the land to be inclosed, as to the quantity and quality of the land to be allotted to them respectively, so far as may be consistent with the general convenience of such persons, and that such valuer, in making the said allotments, shall have particular regard to the convenience of the persons interested in respect of the smallest estates in the land subject to be inclosed under this Act.

Allotments to be fenced.

LXXXIII. And be it enacted, that the several allotments to be made, except the allotments to the surveyor, and churchwardens and overseers respectively, and the other allotments for public purposes, shall be inclosed, ditched, and fenced at the expense of the respective persons to whom the same shall be allotted, in such manner and within such times as the valuer shall direct;* and the fences so to be made shall for ever afterwards be repaired and maintained by such persons as the

* Where the proper allottee will not fence, the neighbouring owner, aggrieved by his neglect, may, after notice, make fence, and recover the cost. See 11 & 12 Vict. c. 99, s. 12.

valuer shall direct; and if from the situation or from any other circumstance it shall happen that any person to whom any allotment shall be made shall not have a fair proportion of the boundary ditches or fences assigned to him to make, it shall be lawful for the valuer acting in the matter of any inclosure to ascertain and appoint what sum of money shall be contributed by such person towards making the boundary ditches and fences of the allotments of such other persons as shall have assigned to them to make too great a proportion thereof; and such money shall be paid to such persons and in such manner as by the valuer shall be directed, and the same may be recovered in the same manner as penalties or forfeitures are recoverable under this Act.*

If interest in land is sold before allotment is made, the valuer to make the allotment to the purchaser.

LXXXIV. And be it enacted, that if at any time before an allotment shall have been made by the valuer, any person shall sell his right or interest in the land to be inclosed, or any part thereof, to any person, the valuer shall, upon such sale being certified to him in writing by the vendor, make an allotment of land to the purchaser, or to his heirs or assigns, in respect of the right or interest so sold; and every such purchaser, or his heirs or assigns, shall from the confirmation of the award hold

* The 11 & 12 Vict. c. 99, ss. 10 & 11, provides remedies against persons injuring fences.

and enjoy the land so to be allotted to him in such manner as the vendor might or ought to have done in case such sale had not been made; and it shall be lawful for any person who shall be entitled to any allotment under this Act to devise, convey, surrender, or otherwise assure the same allotment, or all or any part of his interest therein, at any time before the confirmation of the award; and every such devise, conveyance, surrender, and assurance shall be of the same validity as if the same had been made after the confirmation of the said award; and it shall be lawful for any person entitled to any allotment to sell, dispose of, or convey the estate in right of which he may be entitled to such allotment, separate from and retaining to himself such allotment, or the right thereto; and the valuer is hereby required to award such allotment accordingly.

Allotments to be made to representatives of parties dying.

LXXXV. And be it enacted, that if any person interested in any inclosure under this Act shall die before the same shall have been completed, the powers and authorities hereby vested in the commissioners, assistant-commissioner, and valuer shall not be thereby determined or suspended, but they shall proceed in the execution of such powers and authorities in such manner as they might have done in case such person had not died; and the allotment which might have been made to

the person so dying shall be made to such person as by the law shall become entitled to the same, and shall be accepted and fenced by such party according to the directions contained in the award, and he shall be liable to the charges and expenses and other conditions of the inclosure.

Old Inclosures.

Old inclosures may be allotted, with consent.

LXXXVI. And be it enacted, that it shall be lawful for the valuer acting in the matter of any inclosure, with the consent in writing of the person interested in any old inclosed lands, or lands holden in severalty, or otherwise not subject to be inclosed under the general provisions hereinbefore contained, but within the parish in which the land to be inclosed, or some part thereof, shall be situate, or within some parish adjoining thereto, to order and direct such old inclosed lands or other lands as last aforesaid to be considered as allottable, and parcel of the land to be inclosed; and such allowance shall be made to the person interested in such lands, on account of the situation or other beneficial circumstances thereof, as the valuer shall adjudge to be just and reasonable: and he shall allot and award unto the person so interested in such old inclosed lands or other lands as aforesaid so much and such part of the land

to be inclosed as he shall think reasonable and just.

*Allotments to Classes of Persons.**

Allotments to freemen and other classes of persons entitled to common rights to be made to trustees.

LXXXVII. And be it enacted, that where the freemen or burgesses of any city or borough, or the householders or inhabitant householders of any town or place, or any class or description of such freemen, burgesses, householders or inhabitant householders, or any other persons as a class, shall be entitled to rights of common or other rights over the lands to be inclosed, it shall be lawful for the valuer to award in respect of such rights one or more allotment or allotments, for the benefit of the class so entitled, to any two or more trustees, who shall be nominated by the majority at such meeting as hereinafter mentioned, or in case two or more trustees shall not be nominated at such meeting, then to such trustees as the commissioners shall approve, with provisions for the appointment of new trustees from time to time, or to the churchwardens and overseers of the poor of the parish in which each allotment shall be situate, in trust for the parties entitled to the

* By the 12 & 13 Vict. c. 83, it is provided that persons having similar rights of common may be dealt with as a class.

right in respect of which the allotment shall be made; and it shall be also lawful for the valuer, having regard to such instructions, if any, as may have been resolved on at such meeting as hereafter mentioned, or to such instructions as shall be given by the commissioners in this behalf, to direct in what manner and under what regulations such allotment shall be occupied or enjoyed by the persons from time to time entitled to the benefit thereof, and (in case the valuer, having regard to such instructions, shall think fit) to give directions and powers for the letting of such allotment from year to year, or for any term of years, subject to such provisions and restrictions as the said valuer, with the approbation of the commissioners, shall think fit, and for the receipt of the money to arise from such letting, and for the application of such money for the benefit of the persons entitled to the benefit of the allotment, and to give all such directions and provisions for the fencing, draining, and management of such allotment, as the valuer may think expedient.

Power to sell such allotments.

LXXXVIII. Provided also, and be it enacted, that it shall be lawful for the valuer, with the approbation of the commissioners and of such meeting as hereinafter mentioned, to sell and dispose of the whole or any part of any allotment to which any such class of per-

sons as aforesaid shall be entitled under this Act; and the allotment or any part thereof so sold shall be conveyed by the commissioners as the purchaser shall direct, and the commissioners shall sign a receipt for the purchase money, which shall be a sufficient discharge for the same; and the purchase money arising from the sale, or the surplus thereof after payment thereout of any expenses to which the same shall be liable, shall, with the approbation of the commissioners, be paid to any trustee or trustees, upon trust for the investment thereof, with provisions for the appointment of new trustees from time to time, and for the application of the interest and annual produce of such investment to such purposes, for the benefit of the persons who would have been entitled to such allotment, or the part thereof so sold, in case the same had not been sold, as the commissioners shall approve, and by the final award in the matter of such inclosure direct.

Application of purchase money.

LXXXIX. Provided also, and be it enacted, that when the claim of any class of persons entitled as aforesaid shall be allowed, the valuer shall certify such allowance to the commissioners, and the commissioners shall call a meeting of such persons by advertisement, for the purpose of appointing trustees of the allotment to be made for their benefit, and

Meeting of persons so entitled for giving instructions to valuer.

for giving instructions to the valuer concerning the enjoyment, occupation, and management of such allotment, or for letting the same, and for the application of the money to arise from such letting, or in case such meeting shall think fit that such allotment or any part thereof shall be sold, for directing the sale thereof, and the investment of the money arising from such sale, and the application of the income thereof; and the commissioners, having reference to the total number of such class (so far as the valuer or the commissioners may have ascertained the same), shall by such notice declare the number of persons who should be present at such meeting to give validity to the proceedings; and the decision of the majority of such meeting shall bind the minority and all absent parties: provided always, that no meeting shall be effectual for the purpose aforesaid unless such a number of the said persons shall attend the same as shall be mentioned in that behalf in the advertisement calling such meeting; and if no effectual meeting shall be held for the purpose aforesaid, or, being held, no instructions shall be resolved on by the majority present at such meeting, or in case the commissioners shall deem such instructions unjust or unreasonable, the commissioners may give such instructions to the valuer in respect of the matters aforesaid as they shall think fit; provided that no sale

of any such allotment or any part thereof shall be made except in pursuance of a resolution of a meeting called as aforesaid; but a recital in the conveyance by the commissioners upon any sale that such sale was duly authorized shall for all purposes of title be evidence that such sale was made in pursuance of the resolution of a meeting duly called as aforesaid.

Partitions may be made.

XC. And be it enacted, that where any persons interested in land to be inclosed under this Act * shall be so interested in undivided shares, or as joint tenants, coparceners, or tenants in common, it shall be lawful for the valuer, upon the request in writing of any of the persons so interested in undivided shares, or as joint tenants, coparceners, or tenants in common, to make partition of the lands or allotments coming to such persons so interested, and to allot the same to such persons in severalty; and immediately after the said allotments shall be so made and declared the same shall be holden and enjoyed by the persons to whom the same shall be allotted in severalty, subject to the same uses as such undivided share would have been subject to in case such partition had not been made; and every such partition shall be specified in the

* This provision is now extended to lands not under inclosure. See 11 & 12 Vict. c. 99, *post*.

award, and shall be valid and effectual to all purposes.

Costs of partition.

XCI. And be it enacted, that all costs and expenses attending any partition to be made by virtue of this Act shall be borne and defrayed by the several proprietors of or persons interested in the estates which shall be so parted in such manner and proportions as the valuer shall order, and in case of non-payment thereof shall be recovered in the manner directed with respect to the recovery of penalties and forfeitures.

Exchanges.

Exchanges.

XCII. And be it enacted, that it shall be lawful for the valuer to allot and award any land to be inclosed in exchange for any other land within the parish in which the land to be inclosed shall be situate, or any adjoining parish; and it shall be lawful for the valuer, in exercise of this present power, to allot all or any part of the land which would have been subject to be allotted under this Act for the purposes of exercise and recreation, or for the labouring poor, or for any other public purposes, to any person, in exchange for other land in the parish or in any adjoining parish which shall appear to the valuer more suitable or convenient for the purposes of exercise and

recreation, or for the labouring poor, or for such other public purposes as aforesaid, and to allot such other land for such purposes accordingly; and all lands taken and allotted as aforesaid under this provision, although not situate in the parish in which the land given in exchange for the same shall be situate, shall for the purposes of the provisions herein contained be deemed to be within such parish, and be managed and dealt with accordingly; provided that all exchanges under which land shall be taken and allotted for public purposes as aforesaid shall be made with the consent of the person interested in the land so taken, and that all other exchanges be made with the consent in writing of the persons interested in the lands so exchanged; and every such exchange so to be made shall be valid and effectual to all purposes, and shall be specified and declared in the award: provided also, that no exchange shall be made of any land held in right of any church or chapel or other ecclesiastical benefice, without the consent, testified in writing, of the bishop of the diocese and the patron of such benefice: provided also, that all costs and expenses attending the making and completing of any such exchanges, except exchanges of land taken for public purposes, shall be borne by the several parties making such exchanges in such manner and in such proportions as the valuer shall direct, and in case of

non-payment thereof shall be recovered in the manner directed with respect to the recovery of penalties and forfeitures; and the expenses of the exchanges of land taken for public purposes shall be considered part of the expenses of the inclosure.

Wills and settlements not to be affected.

XCIII. And be it enacted, that nothing in this Act contained shall extend to revoke, make void, or alter any will, settlement, uses, or trusts, or to prejudice any person having any right or claim of dower, jointure, annuity, portion, debt, charge, rent, or incumbrance upon or affecting any of the land to be inclosed, or which shall be exchanged or given in partition, in pursuance of this Act, but the land allotted, and the land given in exchange or partition, shall immediately after such allotment, exchange, or partition be and enure, and the several persons to whom the same shall be allotted or given in exchange or partition as aforesaid shall thenceforth stand and be seised and possessed thereof respectively to and for such and the same estates, uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the several lands, rights, or undivided shares thereof, in respect whereof such allotments, exchanges, and partitions shall have been made would have stood limited to and for or been subject to in case the same had not been allotted, exchanged,

or given in partition as aforesaid, and as if this Act had not been made, save and except such leases and tenancies at rack rents as shall become void by virtue of this Act, and any joint tenancy which may have been severed by partition as aforesaid, and such rights of common and other rights as are intended to be extinguished by the inclosure, and subject nevertheless to all such mortgages and sales, as shall be made by authority of this Act.

Tenure of the allotments.

XCIV. And be it enacted, that all such land as shall be taken in exchange or on partition or be allotted by virtue of this Act shall be held by the person to whom it shall be given in exchange or on partition, or allotted under the same tenures, rents, customs, and services as the land in respect of which such land shall have been given in exchange or on partition or allotted would have been held in case no such exchange, partition, or inclosure had been made; and the land taken in exchange or on partition or allotted in respect of freehold shall be deemed freehold; and the land taken in exchange or on partition or allotted in respect of copyhold or customary land shall be deemed copyhold or customary land, and shall be held of the lord of the same manor under the same rent and by the same customs and services as the copyhold or customary land in respect of which it may have been taken in exchange or

on partition or allotted was or ought to have been held, and shall pass in like manner as the copyhold or customary land in respect whereof such exchanges, partitions, or allotments shall be made, and as to copyhold or customary allotments without any new admittance in respect of the lands taken or allotted respectively ;* and the land given in exchange or on partition or allotted in respect of leasehold land shall in like manner be deemed leasehold, and shall be held under the same rents and covenants as the land in respect of which it may have been allotted was held, and the remainder or reversion thereof shall be vested in the same lessor respectively as the remainder or reversion of such other land was vested before the exchange, partition, or allotment, except where otherwise particularly directed by this Act.

Leases.

Leases at rack rent may be voided.

XCV. And be it enacted, that immediately after the allotments herein directed to be made on any inclosure shall have been marked and staked out the valuer acting in the matter of such inclosure may direct the same to be entered upon by the persons respectively for

* By the Amendment Act, 10 & 11 Vict. c. 111, s. 6, it is provided that with consent of the lord of the manor, the commissioners may declare that such land shall be held as of freehold tenure.

whom the same shall be intended; and immediately after the valuer shall so direct them to be entered upon, all leases, agreements, and tenancies at rack rent subsisting of any part of the land to be inclosed, or which shall be exchanged in pursuance of this Act, or any common right thereon, shall, so far only as respects the land to be divided and allotted or exchanged, or common right, cease and be void at such time or times as the valuer shall by writing under his hand direct or appoint, so as the respective lessors or landlords of such land do, before or at the respective times at which such leases, agreements, or tenancies shall be directed to cease, make and pay such satisfaction to the respective lessees or tenants, for the loss which shall be sustained by the determination of such leases, agreements, and tenancies respectively, so far as regards the land or common right, the leases, agreements, and tenancies whereof are hereby authorized to be determined, as shall be mutually settled and agreed between them, or as the valuer, being required by either of the parties, shall ascertain and direct: and the valuer, being so required, is hereby empowered and directed, by writing under his hand, to apportion a reasonable and proportionable part, having regard to the season of the year, of the rent reserved on any such lease, agreement, or tenancy, for or in respect of the time

which shall have elapsed between the last day on which any payment of the rent shall have become due, and the determination of any such lease, agreement, or tenancy, and such part of the rent shall be recoverable by such ways and means as may by law be used for the recovery of rent in arrear; and the valuer is hereby empowered and directed, in every case where such land or common right shall be held by virtue of any such lease, agreement, or tenancy, together with other lands or hereditaments, by one entire rent, by writing under his hand to apportion and determine what part of such rent shall be deducted in respect of the land or common right in such lease, agreement, or tenancy comprised as to which the same shall be determined as aforesaid, and from what time such deduction shall take place, and the rest of the rent reserved on any such lease, agreement, or tenancy shall during the remainder of the term thereof be the rent of and for the residue of such lands and hereditaments, and shall be payable and recoverable in like manner as the entire rent reserved by such lease, agreement, or tenancy shall immediately before such apportionment be payable and recoverable; and the lessor or reversioner shall in respect of such apportioned rent, and in respect of the residue of such lands and hereditaments, have the benefit and advantage of the provisoes and conditions

which would have been applicable to the entire rent, and to all the lands and hereditaments comprised in such lease, agreement, or tenancy, in case such lease, agreement, or tenancy had not been determined as to any part of such land: provided always, that no lease, agreement, or tenancy shall be determined as aforesaid as to any house, cottage, or other building without three calendar months' previous notice in writing of such determination, under the hand of the valuer, shall have been given to the lessee or tenant, or left at such house, cottage, or building.

Seigniories.

Seigniories not affected, except with consent.

XCVI. Provided always, and be it enacted, that in every case all seigniories, royalties, franchises, and manorial jurisdictions whatsoever in or upon the land to be inclosed under this Act shall not be deemed to be compensated or extinguished, but shall be saved and excepted out of the operation of this Act, unless in and by the award it shall be declared, with the consent of the lord or respective lords interested therein, that such seigniories, franchises, royalties, and jurisdictions shall be extinguished upon the proposed inclosure.

Minerals.

Minerals under regulated pastures may be reserved, while minerals under lands to be held in severalty are relinquished.

XCVII. Provided always, and be it enacted, that in every case in which, under the provisions hereinafter contained, part of the land subject to be inclosed under this Act shall be converted into and used as a regulated pasture, and the residue thereof shall be divided and allotted in severalty, it shall be lawful for the valuer, having regard to the right of the lord of the manor, as the same shall have been ascertained and declared by the provisional order of the commissioners, and with the consent of the lord of the manor and a majority in value of the other persons interested in the lands proposed to be inclosed, to direct that the rights of the lord of the manor in and to all or any of the mines, minerals, stone, and other substrata under such part of the land as shall be converted into and used as a regulated pasture shall be reserved to the lord, and that all or any of the mines, minerals, stone, and other substrata under the residue to be divided and allotted in severalty shall become the property of the owners of the respective allotments, and that the allotments be adjusted accordingly.

Right to minerals under land inclosed

XCVIII. Provided also, and be it enacted, that in every case in which the right to all or

of any such allotment or any part thereof shall be made except in pursuance of a resolution of a meeting called as aforesaid; but a recital in the conveyance by the commissioners upon any sale that such sale was duly authorized shall for all purposes of title be evidence that such sale was made in pursuance of the resolution of a meeting duly called as aforesaid.

Partitions may be made.

XC. And be it enacted, that where any persons interested in land to be inclosed under this Act * shall be so interested in undivided shares, or as joint tenants, coparceners, or tenants in common, it shall be lawful for the valuer, upon the request in writing of any of the persons so interested in undivided shares, or as joint tenants, coparceners, or tenants in common, to make partition of the lands or allotments coming to such persons so interested, and to allot the same to such persons in severalty; and immediately after the said allotments shall be so made and declared the same shall be holden and enjoyed by the persons to whom the same shall be allotted in severalty, subject to the same uses as such undivided share would have been subject to in case such partition had not been made; and every such partition shall be specified in the

* This provision is now extended to lands not under inclosure. See 11 & 12 Vict. c. 99, *post*.

award, and shall be valid and effectual to all purposes.

Costs of partition.

XCI. And be it enacted, that all costs and expenses attending any partition to be made by virtue of this Act shall be borne and defrayed by the several proprietors of or persons interested in the estates which shall be so parted in such manner and proportions as the valuer shall order, and in case of non-payment thereof shall be recovered in the manner directed with respect to the recovery of penalties and forfeitures.

Exchanges.

Exchanges.

XCII. And be it enacted, that it shall be lawful for the valuer to allot and award any land to be inclosed in exchange for any other land within the parish in which the land to be inclosed shall be situate, or any adjoining parish; and it shall be lawful for the valuer, in exercise of this present power, to allot all or any part of the land which would have been subject to be allotted under this Act for the purposes of exercise and recreation, or for the labouring poor, or for any other public purposes, to any person, in exchange for other land in the parish or in any adjoining parish which shall appear to the valuer more suitable or convenient for the purposes of exercise and

the time being, is hereby empowered to take and impound any such horse, beast, cattle, sheep, or swine which shall be found so grazing as aforesaid, as cattle damage feasant: provided always, that nothing herein contained shall prevent the proprietors of the land which shall next adjoin the private roads and ways from depasturing their cattle thereon so far as the frontage of their respective land extends.

Alteration of Allotments.

Alteration may be made in allotments.

CI. And be it enacted, that it shall be lawful for the valuer acting in any inclosure, at any time before the confirmation of the award, with the approbation or by the direction of the commissioners, to make any alterations which he may think right and expedient in the allotments or in the fences which he may have set out and ordered, or in the private roads he may have set out, or in any of the orders or directions relating thereto which he may have made in the matter of such inclosure; and in case any person shall be injured by any such alteration, on account of any expenses he may have incurred, or otherwise, the valuer shall ascertain and determine what recompence shall be made to him for such injury, and shall either pay the amount thereof out of the moneys raised for the expense of the inclosure, or shall direct by whom and in what manner

such recompence shall be made; and in case of non-payment thereof the same shall be recovered in the same manner as penalties and forfeitures are recoverable under this Act.

Valuer's Report.

CII. And be it enacted, that the valuer acting in the matter of any inclosure shall, as soon as conveniently may be after the division and allotment of the land to be inclosed shall be completed, draw up a report in writing, with a map thereunto annexed, which shall specify all the claims allowed, and all the allotments, exchanges, and partitions made in the matter of such inclosure, and all roads, ways, and works set out or directed to be made by the said valuer; and such report shall contain all such particulars in relation to such allotments, roads, ways, and works as are by this Act directed, and all such other directions and determinations authorized by this Act as the said valuer shall think proper for the purposes of the inclosure; and the map to be annexed to such report shall comprise and show the land to be inclosed and the lands exchanged, and also the lands in respect of which any allotments of the land inclosed shall have been made,* and shall distinguish by proper

Valuer to draw up a report and annex thereto a map of the claims.

* The Amendment Act, 11 & 12 Vict. c. 99, s. 2, enables the commissioners, by a special order, to dispense with this requisite.

references the allotments made in respect of the several lands respectively, and such other particulars as the commissioners shall by any general or special instructions in relation to such report direct the valuer to set forth therein; and such report shall be signed by the valuer, and shall, together with the map thereunto annexed, be sent to the office of the commissioners.

Report to be deposited for inspection.

CIII. And be it enacted, that as soon as the report of the valuer shall have been sent to the commissioners they shall cause a copy of the same to be deposited at some convenient place within the parish in which the land to be inclosed, or some part thereof, shall be situate, for the inspection of all persons interested in such land, and shall forthwith cause notice to be given where the said copy may be inspected, and shall also in such notice appoint some convenient place, and such times as they shall think necessary (the first not earlier than twenty-one days from the first giving of such notice), for holding a meeting to hear objections to any allotment, direction, determination, or matter in the report; and the commissioners or some assistant-commissioner, at such meeting as aforesaid, shall hear and determine any objections which may be then and there made to any such allotment, direction, determination, or matter by any person inte-

rested therein, or adjourn the further hearing thereof, if they or he shall think proper, to a future meeting, and may, if they or he shall see occasion, direct any further valuation or survey of the land or any part thereof, and take such other measures for ascertaining the justice and propriety of the determinations and directions of the valuer, as to the commissioners or assistant-commissioner shall seem proper, and from time to time, if they or he shall see occasion, fix further meetings for the hearing and determining of objections, of which further meetings, when not holden by adjournment, notice shall be given in manner hereinbefore directed with regard to the original meeting; and when the said commissioners or assistant-commissioner shall have heard and determined all such objections, and made such inquiries as the commissioners shall think fit in relation thereto, the commissioners shall approve such report, or cause the allotments, directions, determinations, and matters therein mentioned, or any of them, to be amended, as they shall see occasion.

Valuer's Award.

CIV. And be it enacted, that after such proceedings as aforesaid shall have been had, and all such objections to such report (if any) shall have been finally disposed of, and such amendments (if any) shall have been made in

Award to be drawn up by the valuer.

the allotments, directions, and matters therein contained as aforesaid, the valuer, under the direction of the commissioners, shall cause to be drawn up and engrossed on parchment the award in the matter of such inclosure, which shall be signed by the valuer, and shall describe the boundaries, if any, which shall have been ascertained and set out under the provisions hereinbefore contained, and shall contain or set forth the report of the valuer, or the allotments, exchanges, partitions, directions, and matters contained in such report, if so approved as aforesaid, or such allotments, exchanges, directions, and matters therein contained as the same shall have been amended as aforesaid, and shall contain a declaration whether all or any and which of the mines, minerals, stone, and other substrata shall or shall not have been included in the estimate of the right and interest of the lord in the soil (in respect of which any allotment shall have been made to him), and the valuer shall annex to such engrossment the map referred to by such report; and the commissioners shall confirm such award, with the date of such confirmation thereunto annexed, under their hands and seal.*

and confirmed by the commissioners.

Confirmation of award to be conclusive evidence

CV. And be it enacted, that such confirma-

* This award may also contain a declaration as to parish boundaries. See 12 & 13 Vict. c. 83, s. 1, *post*.

tion as aforesaid shall be conclusive evidence that all the directions of this Act in relation to such award and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, shall have been obeyed and performed; and no such award shall be impeached by reason of any mistake or informality therein, or in any proceeding relating thereunto, or on account of any want of any notices or consents required by this Act, or on account of defects or omissions in any previous proceeding whatever in the matter of the inclosure; and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever.

that the directions of this Act have been obeyed.

CVI. And be it enacted, that the several allotments which shall upon any inclosure under this Act be allotted to the several persons who shall be entitled to the same shall when so allotted be and be taken to be in full bar of and satisfaction and compensation for their several and respective lands, rights of common, and all other rights and properties whatsoever, not excepted or reserved by this Act or by the award in the matter of such inclosure, which they respectively had or were entitled to in and over the said lands imme-

Allotments to be in compensation of previous rights.

diately before such inclosure; and that from and immediately after the confirmation of the award by the commissioners, or at such earlier time as the valuer, with the approbation of the commissioners, shall by notice on the church door direct, all rights of common, and all rights whatever by the inclosure intended to be extinguished, belonging to or claimed by any person whomsoever, in or upon such lands, shall cease, determine, and be for ever extinguished.

Supplemental Order.

Allotments may be subdivided by supplemental order.

CVII.* Provided always, and be it enacted, that when any award, so confirmed as aforesaid, shall not have distinguished the several tenures of any of the lands therein mentioned, or the different estates or titles for or under which the same shall be held, or shall have set out and awarded an aggregate allotment in any case in which there should have been set out and awarded several and distinct allotments, it shall be lawful for the commissioners, at any time within two years after the confirmation of the award, upon request in writing to them made by any person interested in any such aggregate allotment, to do all such acts as may be necessary for supplying such omission, and

* See note to sect. 152.

for subdividing such aggregate allotment, and for that purpose to examine witnesses, and proceed as if the said award had not been confirmed, and by any order or instrument under their hands and seal to subdivide any aggregate allotment into separate allotments, and to distinguish and set out the allotments and lands held by different tenures, and also the allotments and lands held by, for, or under different estates or titles respectively, in the same manner as by this Act is authorized and required to be done in cases where such allotments and lands are directed to be ascertained, distinguished, and set out by the valuer; and every such separate instrument shall have the same power and effect as if it were contained in the said award: and such instrument shall be engrossed, and deposited with the award, and shall thenceforth be deemed to be part thereof to all intents and purposes; and all the expenses which shall be reasonably incurred in or about any such subsequent inquiry or separate instrument as aforesaid, and the engrossment thereof, shall be paid by the party who shall have requested the commissioners to make and execute the same, or by his executors or administrators.

Management of Allotments for Labouring Poor.

CVIII. And be it enacted, that the allotment upon which any inclosure under this Act shall be made for the labouring poor shall be

Allotment for the labouring poor shall be managed

by the allotment wardens.

under the management of the incumbent of the parish or ecclesiastical district in which such allotment shall be situate (or the officiating minister for the time being nominated by the incumbent for that purpose), the churchwarden, if there be but one, or (if there be more than one) one of the churchwardens for the time being of such parish, and two other persons who shall be rated to the relief of the poor in such parish; and such churchwarden, where there is more than one churchwarden, shall be yearly named, and such two other persons shall be yearly chosen and appointed, at the same time, and by the same persons, and in the same manner, as the overseers of the poor for such parish shall be chosen and appointed, and shall continue in office in like manner until the next appointment of overseers, or until others are named and chosen and appointed in their stead; and such incumbent (or officiating minister), churchwarden, and two other persons for the time being shall be styled "the allotment wardens" of the parish, and shall manage and let the said allotment as hereinafter provided, and all things by this Act authorized to be done by such allotment wardens may be done by any two of them, and in the event of the death or retirement from office of any one or more of the said allotment wardens, the surviving or continuing wardens may act as if no such vacancy had happened.

CIX. And be it enacted, that the allotment wardens shall from time to time let the allotment under their management in gardens not exceeding a quarter of an acre each to such poor inhabitants of the parish for one year, or from year to year, at such rents, payable at such times, and on such terms and conditions, not inconsistent with the provisions of this Act, as they shall think fit: provided always, that the commissioners may frame such regulations, not inconsistent with the provisions of the Act, for the letting of such allotments as aforesaid, as they may think advisable, and such regulations shall be obligatory on the allotment wardens during five years from the date thereof or during such shorter period as the commissioners shall direct: provided also, that the gardens so to be let shall be let free of all tithe or tithe rent-charge (if any), rates, taxes, and assessments whatsoever, and shall before the first letting thereof, and once at least in every ten years after such first letting, be valued by a competent person to be appointed by the allotment wardens for that purpose, who shall estimate the full rent which the same would be worth to be let by the year for farming purposes, all tithes or tithe rent-charge, rates, taxes, and assessments, being borne by the landlord, and shall verify such valuation by solemn declaration under the statute; and the rent at which the same gardens

Such allotments how to be left.

respectively shall be let shall be not below the full yearly value of the land according to the last of such valuations; and the allotment wardens shall, for the purposes of all rates and taxes, be deemed the occupiers of such allotment, and shall pay all rates and taxes, tithes and tithe rent-charge (if any), in respect thereof: provided always, that no building whatsoever shall, under any such letting as aforesaid or otherwise, on any pretence, be erected for or used as a dwelling on any such garden or on any part of any such allotment; and in case any such building shall be erected or used as aforesaid, contrary to this provision, the allotment wardens shall forthwith pull down the same, and sell and dispose of the materials thereof, and the produce of such sale shall be applicable in like manner as the rents of such gardens.

Recovery of gardens on nonpayment of rent, &c.

CX. And be it enacted, that if the rent reserved upon the letting of any garden by the allotment wardens shall at any time be in arrear for forty days, or if at any time during the tenancy, being not less than three calendar months after the commencement thereof, it shall appear to the allotment wardens that the occupier of such garden shall not have duly observed the terms and conditions of his tenancy, or shall have gone to reside more than one mile out of the parish, then and in every

such case the allotment wardens shall serve a notice upon such occupier, or in case he shall have gone to reside out of the parish shall affix the same to the door of the church of the parish, determining the tenancy at the expiration of one month after such notice shall have been so served or affixed, and thereupon such tenancy shall be determined accordingly: provided always, that in every such case the allotment wardens or their incoming tenant shall pay to the occupier whose tenancy shall have been so determined a fair recompence in money for any crops (not being crops prohibited by the terms of such tenancy) which may be growing on such garden at the time of such determination, and for any manure left on such garden, or any benefit accruing from the manuring of such garden to the wardens or their incoming tenant; and the justices to whom application may be made for a warrant to give possession of such garden shall settle the amount of such recompence, in case the parties differ about the same, and stay the execution of such warrant until the same shall have been paid or tendered, or (in case such occupier be absent) until the payment thereof shall have been secured to the satisfaction of such justices.

references the allotments made in respect of the several lands respectively, and such other particulars as the commissioners shall by any general or special instructions in relation to such report direct the valuer to set forth therein; and such report shall be signed by the valuer, and shall, together with the map thereunto annexed, be sent to the office of the commissioners.

Report to be deposited for inspection.

CIII. And be it enacted, that as soon as the report of the valuer shall have been sent to the commissioners they shall cause a copy of the same to be deposited at some convenient place within the parish in which the land to be inclosed, or some part thereof, shall be situate, for the inspection of all persons interested in such land, and shall forthwith cause notice to be given where the said copy may be inspected, and shall also in such notice appoint some convenient place, and such times as they shall think necessary (the first not earlier than twenty-one days from the first giving of such notice), for holding a meeting to hear objections to any allotment, direction, determination, or matter in the report; and the commissioners or some assistant-commissioner, at such meeting as aforesaid, shall hear and determine any objections which may be then and there made to any such allotment, direction, determination, or matter by any person inte-

rested therein, or adjourn the further hearing thereof, if they or he shall think proper, to a future meeting, and may, if they or he shall see occasion, direct any further valuation or survey of the land or any part thereof, and take such other measures for ascertaining the justice and propriety of the determinations and directions of the valuer, as to the commissioners or assistant-commissioner shall seem proper, and from time to time, if they or he shall see occasion, fix further meetings for the hearing and determining of objections, of which further meetings, when not holden by adjournment, notice shall be given in manner hereinbefore directed with regard to the original meeting; and when the said commissioners or assistant-commissioner shall have heard and determined all such objections, and made such inquiries as the commissioners shall think fit in relation thereto, the commissioners shall approve such report, or cause the allotments, directions, determinations, and matters therein mentioned, or any of them, to be amended, as they shall see occasion.

Valuer's Award.

CIV. And be it enacted, that after such proceedings as aforesaid shall have been had, and all such objections to such report (if any) shall have been finally disposed of, and such amendments (if any) shall have been made in

Award to be drawn up by the valuer.

tions which shall be given to him under the provisions of this Act, ascertain and set out the part which shall be so used as a regulated pasture, and shall direct how and at whose expense the same shall be fenced and divided from the residue of such land; and the valuer acting in the matter of such inclosure shall, in every case where land shall be so directed to be used as a regulated pasture, ascertain and allot the respective stints or rights of pasturage (specifying the respective numbers of the respective kinds of stock or animals to be admitted to the pasture in respect of such respective stints or rights of pasturage, with such option as to equivalent numbers of the respective kinds of stock and animals as he shall think just, and, if he shall think fit, specifying the time during which such stock or animals may be kept on the pasture,) as he shall adjudge and determine to be proportionate to the value of the respective rights and interests of the persons interested as aforesaid; and the commissioners may frame such directions as they shall think fit for guiding the valuer in the correct specification of such stints or rights: provided always, that in every case in which part only of the land subject to be inclosed under this Act shall be so directed to be used as a regulated pasture, and the residue thereof to be divided and allotted in severalty, it shall be lawful for such valuer, having regard to

the convenience of the persons interested in such land, to award to any such person either a stint or right of pasture, or an allotment in severalty only, or both a stint or right of pasture and an allotment in severalty, so as such stint or right only, or such allotment only, or (as the case may be) such stint or right and allotment together, be in the judgment of the valuer proportionate to the right and interest in respect of which the same shall be awarded: provided also, that in any case in which it shall appear to the valuer that the proportionate right or interest of any person is too small to be conveniently compensated by a stint or right of pasture, or that it is not practicable wholly to compensate such person by a stint or right of pasture, and the circumstances of the inclosure will not admit, in the judgment of the valuer, of an adjustment or compensation by an allotment in severalty, it shall be lawful for such valuer, for the purpose of compensation or adjustment, to direct a sum of money to be paid to such person in lieu of or (as the case may require) in addition to the award of a right of pasture or stint; and such sum of money shall be paid out of the moneys applicable to the payment of the expenses of the inclosure.

Conversion into regulated pasture to be deemed an inclosure.

CXIV. And be it enacted, that all the provisions and powers hereinbefore contained in relation to public and private roads, ways, and

works, and all other the powers, provisions, and directions, penalties and forfeitures, applicable to the case of an inclosure under this Act, and the provisions and directions concerning examination of claims, and the rehearing thereof, and the report of the valuer, and the amendment of the matter thereof, and the award, and the confirmation and effect of the award, shall be applicable to the case where the land subject to be inclosed shall be directed to be used as a regulated pasture; and the word "inclosure" shall in every case in this Act where the context is not repugnant to such construction include the conversion of land subject to be inclosed into such regulated pasture, and the proceedings in relation thereto.

Rule of rating to be established.

CXV. And be it enacted, that in every case in which land shall be directed to be converted into and used as regulated pasture under this Act, the valuer acting in the matter of the inclosure shall determine and direct the proportionate shares or aliquot parts which the respective owners for the time being of the several stints or rights of pasture shall be liable to pay of any sum of money which shall be raised by way of rate on such owners under the provisions of this Act; and such determination and direction, in case the same shall be approved, or as the same may be amended by the

commissioners, shall be for ever after observed in every rate to be made under the provisions of this Act, and shall be the rule also according to which the proportionate values of the stints shall be determined in taking the votes of the owners of stints under the provisions hereinafter contained.

Property of soil of regulated pastures.

CXVI. And be it enacted, that the right of soil of and in all land which shall be converted into regulated pastures shall, subject to the right of the lord of the manor to all or any of the mines, minerals, stone, and other substrata, where the same shall be reserved to him under this Act, and to the other rights given or reserved by this Act and the award in the matter of such inclosure, be vested in the persons who under the directions and determinations of such award shall be the owners of the stints or rights of pasture therein, in proportion to the shares or aliquot parts which such stints shall be thereby declared liable to of any rate under this Act, as tenants in common.

Election of field reeves.

CXVII. And be it enacted, that where any land shall have been converted into a regulated pasture under the provisions of this Act a meeting shall be called by the commissioners of the owners of the stints or rights of pasture, at such time after the confirmation of the award as the commissioners shall by notice on the

church door appoint; and the major part in value of such owners present by themselves, or their agent authorized in this behalf, at such meeting, shall elect a fit person or persons to be field reeve or reeves of such regulated pasture; and every field reeve so to be elected as aforesaid, or to be elected or re-elected at any subsequent meeting, shall continue in office until the expiration of fifteen days after the day of the annual meeting of such owners then next following, and no longer, unless he shall be re-elected at such annual meeting; and such owners shall ever after such first meeting meet for the election of a field reeve or field reeves on the first Monday in February in every year; and the owners assembled at such meetings shall from time to time fix, increase, or diminish the salary or payment to be made to every such field reeve, and may appoint or authorize any field reeve to appoint and employ herds and assistants, as such owners may think fit; and any such field reeve may be removed by four fifths in value of the owners of stints present by themselves or their agents authorized in this behalf at any meeting called for the purpose by fourteen days' notice on the church door under the hands of any two such owners of stints; and in case any such field reeve shall die while he shall hold such office, or shall be removed as aforesaid, it shall be lawful for the majority in value of owners of stints or pastures present as aforesaid at any meeting which upon such va-

cancy any two owners may call by fourteen days' notice on the church door, to appoint a field reeve in his place, who shall hold the office until the expiration of fifteen days after the then next annual meeting; and a certificate in writing under the hands and seals of two justices of the peace of the election of any field reeve (which certificate any two justices of the peace are authorized, if they think fit, to give, on the request and upon the declaration of any owner of such stints as the agent of any such owner present at the meeting at which the election shall have taken place,) shall in all matters and proceedings whatsoever in which any acts done by any field reeve in the execution of his office shall be in question be evidence that he was duly appointed field reeve.

Duties of field reeves.

CXVIII. And be it enacted, that the field reeve or reeves for the time being of every such regulated pasture shall, subject to such orders and instructions in writing as may from time to time be agreed on by the majority in value of the owners of such stints as aforesaid, at their yearly meetings, regulate the times in each year during which stock or animals shall be admitted to and excluded from such regulated pasture, and shall maintain and keep in order the fences, gates, ditches, drains, watercourses, embankments, jetties, and weirs, or make any new fences, gates, ditches, drains,

watercourses, embankments, jetties, or weirs, and do all works necessary for the maintenance and improvement and good order of such regulated pasture, and shall and may distrain all stock and animals found thereon contrary to the regulations of such pasture, and do all other acts for the maintenance and improvement of such regulated pasture, and the convenient use and occupation thereof, as the field reeve or reeves, subject to such instructions as aforesaid, may think fit; and where there shall be any buildings on such regulated pasture, or where the majority in value of the owners of stints at any yearly meeting shall direct that any buildings for the shelter or stall-feeding of stock or animals be erected thereon, such field reeve or reeves shall or may maintain and keep in repair such buildings, or cause such buildings to be erected, in pursuance of such direction, and let the same from year to year, or, under such instructions as aforesaid, for any term of years, and shall receive the rents thereof; and such rents shall be applicable, in the first place, to the same purposes as the rates hereinafter authorized to be raised on the owners of stints are made applicable, and the residue (if any) shall be paid to the owners of stints in proportion to the respective liability of their stints to such rates.

sion able CXIX. And be it enacted, that when it

shall appear to the majority in value of the owners of stints present at any annual meeting that the condition of the pasture would admit of an increase of the respective rights of pasture thereon, or would require a diminution of such respective rights, it shall be lawful for such majority of the owners so present to direct that the respective number of stock or animals to be admitted to the pasture in respect of the several rights be increased, or, as the case may be, diminished, rateably, to such extent as they shall think fit: provided always, that in case it shall happen that the right of any such owner shall not be sufficient to admit of a rateable increase or diminution, such annual money payment shall be made to such owner in lieu of increase of his right, or, as the case may be, charged on such owner in lieu of the diminution of his right, as such majority shall award, or in case the person to or on whom such money payment shall be awarded or charged shall think the sum awarded insufficient, or the sum charged excessive, then as any two justices of the peace shall, upon the complaint of such person, and after summons of the field reeve or one of the field reeves of such pasture (which may be in the form in the schedule to this Act), and on hearing in a summary way the matter in difference, think reasonable and order to be paid; and such order may be in the form in the schedule to this Act; and every

increase or diminution of rights.

such money payment payable in lieu of increase of right shall be paid annually by the field reeve out of the moneys raised by the rate made for the expenses of such regulated pasture; and the money charged on any such owner shall be recoverable as a rate on owners of stints is hereby made recoverable; and all annual payments payable as aforesaid shall be payable on the first Monday in February in every year.

Expenses to be raised by rate.

CXX. And be it enacted, that all salaries and allowances to field reeves and other persons, and all expenses in and about the management of every such regulated pasture, and the repairs and erection of buildings thereon, under the directions of such meetings of owners as aforesaid, and all other expenses of such regulated pasture shall be paid and defrayed by the owners of the respective stints therein; and for that purpose it shall be lawful for the field reeve or one of the field reeves, under the directions of any such meeting of owners, from time to time to make a rate on the respective owners for such sum as the majority of owners present at such meeting shall think requisite; and every such rate shall be apportioned and paid by the owners according to the rule of rating established for such regulated pasture, and shall be paid to the field reeve on demand thereof, and in case the same shall not be paid

within fourteen days after demand thereof, shall be recoverable by distress; and it shall be lawful for any field reeve to exclude from such regulated pasture the stock or animals of any owner or his tenant whose proportion of the rate shall be in arrear and unpaid for fourteen days after demand thereof, until the proportion of such rate so in arrear shall be fully paid; and any such demand or distress may be made of or on the occupier of any such stint as if the occupier were the owner liable to the payment of such rate, and such rate may be paid by any such occupier on demand thereof, and the money so paid by such occupier shall be deemed a payment on account of his rent, and shall be allowed by his landlord accordingly.

Power to apply the Act to pastures already stinted.

CXXI. And be it enacted, that where any land shall be already occupied as a gated or stinted pasture, and any of the persons interested in such gated or stinted pasture whose interests shall not be less in value than two thirds of the whole interest therein, shall be desirous that such gated or stinted pasture should be subject to the provisions of this Act, concerning regulated pastures, without being subject to the other provisions concerning lands subject to be inclosed under this Act, and shall make application in writing to the commissioners to take proceedings for that purpose, it shall be lawful for the commissioners, after

making such inquiries as may appear to them necessary, to cause to be ascertained by any valuer to be appointed or approved by the commissioners for that purpose the proportionate rights and interests of the several persons interested in such pasture, and also the respective rights of pasture to which, having reference to the productiveness of such gated or stinted pasture, the several persons interested therein may, in the judgment of such valuer, be entitled;* and such valuer shall determine and direct, as hereinbefore mentioned, the proportionate liability to rates under this Act of the occupiers of stints or rights of pasture, and in like manner as in case of the conversion into regulated pasture of land subject to be inclosed upon an inclosure under this Act; and the commissioners shall hear or cause to be heard by an assistant-commissioner, any objections to the determinations of claims by and to the report of the valuer respectively, and approve or amend such determinations and such report respectively as they shall think fit; and the valuer, under the direction or with the approval of the commissioners, shall frame and cause to be engrossed an award setting forth such draft award, and the matter of such report, and the commissioners shall confirm the same, with the date of the confirmation, under their hands and seal; and from and after the confirmation

* This will be found a very valuable provision. An inexpensive machinery for the regulation and improve-

of such award such gated and stinted pasture shall be subject to all the provisions herein contained concerning land subject to be inclosed, converted into and used as regulated pasture, and shall be rateable under such provisions according to the rule of rating as set forth in such award; and such award shall be as binding and conclusive as if the same had been made and confirmed on an inclosure under this Act.

Expenses of application of Act to pastures already stinted.

CXXII. And be it enacted, that all the expenses of or attending the proceedings for subjecting lands already used as gated or stinted pasture to the provisions of this Act, concerning lands subject to be inclosed, converted into or used as regulated pasture, shall be paid and borne by the persons interested therein, in proportion to their respective liabilities to rates under this Act, according to the rule of rating established in respect of such gated or stinted pasture under this Act, and shall be paid at such time and place and to such persons as the valuer, with the approbation of the commissioners, signified by writing under their hands and seal, shall direct, and shall be recoverable in such and the same manner as the expenses of an inclosure made in pursuance of this Act.

ment of these pastures has been long required, and must greatly increase the value of such property throughout the kingdom. A private Act of Parliament was before this statute the only resource.

Power to enter Land for Surveys.

Power to enter land for surveys, &c.

CXXIII. And be it enacted, that for surveying and valuing any land to be inclosed or otherwise dealt with under this Act, and for the other purposes of this Act, it shall be lawful for the commissioners, or an assistant-commissioner or valuer, or any person or persons to be appointed by such commissioners, assistant-commissioner, or valuer, at any time after application has been made to the commissioners to sanction an inclosure, or to certify to the expediency of an inclosure, as the case may be, to make any survey, admeasurement, plan, or valuation, with assistants and servants, and at any time or times whatsoever, until the inclosure or other proceedings under this Act shall be completed, to enter into, view, and examine, survey or admeasure, all and every part of the land to be inclosed or dealt with, and to do or cause to be done any act or thing necessary for putting this Act into execution.

Expenses of Inclosures.

Expenses of inclosures.

CXXIV. And be it enacted, that the allowances and payments to be made to and by the valuer, which shall have been audited and approved by or under the directions of the commissioners, and all other the expenses of every

inclosure, except the allowances and salaries to the commissioner who is to have a salary, and to the assistant-commissioners, secretary, clerks, messengers, and officers of the commissioners, and the travelling and other expenses of the commissioners and assistant-commissioners, and except any expenses which the commissioners or assistant-commissioner, or any court under the powers of this Act, shall order to be otherwise paid, shall be borne and defrayed by the several persons interested in the lands to be inclosed (except the surveyors of highways, churchwardens and overseers, and persons to whom lands shall be allotted for public purposes, in respect of the allotments hereinbefore authorized or directed to be made to them respectively) in such shares and proportions, and shall be paid at such time and place, or respective times and places, and to such persons, as the valuer, with the approbation of the commissioners, signified by writing under their hands and seal, shall direct; and such valuer shall give notice requiring payment of the respective shares and proportions of such expenses on the church door, and shall give to all persons so liable, who shall not reside in the parish in which the land inclosed or any part thereof shall be situate, and whose respective places of abode shall be known to the valuer, notice by letter sent by the post of the sums they respectively shall be liable to

church door appoint; and the major part in value of such owners present by themselves, or their agent authorized in this behalf, at such meeting, shall elect a fit person or persons to be field reeve or reeves of such regulated pasture; and every field reeve so to be elected as aforesaid, or to be elected or re-elected at any subsequent meeting, shall continue in office until the expiration of fifteen days after the day of the annual meeting of such owners then next following, and no longer, unless he shall be re-elected at such annual meeting; and such owners shall ever after such first meeting meet for the election of a field reeve or field reeves on the first Monday in February in every year; and the owners assembled at such meetings shall from time to time fix, increase, or diminish the salary or payment to be made to every such field reeve, and may appoint or authorize any field reeve to appoint and employ herds and assistants, as such owners may think fit; and any such field reeve may be removed by four fifths in value of the owners of stints present by themselves or their agents authorized in this behalf at any meeting called for the purpose by fourteen days' notice on the church door under the hands of any two such owners of stints; and in case any such field reeve shall die while he shall hold such office, or shall be removed as aforesaid, it shall be lawful for the majority in value of owners of stints or pastures present as aforesaid at any meeting which upon such va-

cancy any two owners may call by fourteen days' notice on the church door, to appoint a field reeve in his place, who shall hold the office until the expiration of fifteen days after the then next annual meeting; and a certificate in writing under the hands and seals of two justices of the peace of the election of any field reeve (which certificate any two justices of the peace are authorized, if they think fit, to give, on the request and upon the declaration of any owner of such stints as the agent of any such owner present at the meeting at which the election shall have taken place,) shall in all matters and proceedings whatsoever in which any acts done by any field reeve in the execution of his office shall be in question be evidence that he was duly appointed field reeve.

Duties of field reeves.

CXVIII. And be it enacted, that the field reeve or reeves for the time being of every such regulated pasture shall, subject to such orders and instructions in writing as may from time to time be agreed on by the majority in value of the owners of such stints as aforesaid, at their yearly meetings, regulate the times in each year during which stock or animals shall be admitted to and excluded from such regulated pasture, and shall maintain and keep in order the fences, gates, ditches, drains, watercourses, embankments, jetties, and weirs, or make any new fences, gates, ditches, drains,

watercourses, embankments, jetties, or weirs, and do all works necessary for the maintenance and improvement and good order of such regulated pasture, and shall and may distrain all stock and animals found thereon contrary to the regulations of such pasture, and do all other acts for the maintenance and improvement of such regulated pasture, and the convenient use and occupation thereof, as the field reeve or reeves, subject to such instructions as aforesaid, may think fit; and where there shall be any buildings on such regulated pasture, or where the majority in value of the owners of stints at any yearly meeting shall direct that any buildings for the shelter or stall-feeding of stock or animals be erected thereon, such field reeve or reeves shall or may maintain and keep in repair such buildings, or cause such buildings to be erected, in pursuance of such direction, and let the same from year to year, or, under such instructions as aforesaid, for any term of years, and shall receive the rents thereof; and such rents shall be applicable, in the first place, to the same purposes as the rates hereinafter authorized to be raised on the owners of stints are made applicable, and the residue (if any) shall be paid to the owners of stints in proportion to the respective liability of their stints to such rates.

Provision for rateable

CXIX. And be it enacted, that when it

shall appear to the majority in value of the owners of stints present at any annual meeting that the condition of the pasture would admit of an increase of the respective rights of pasture thereon, or would require a diminution of such respective rights, it shall be lawful for such majority of the owners so present to direct that the respective number of stock or animals to be admitted to the pasture in respect of the several rights be increased, or, as the case may be, diminished, rateably, to such extent as they shall think fit: provided always, that in case it shall happen that the right of any such owner shall not be sufficient to admit of a rateable increase or diminution, such annual money payment shall be made to such owner in lieu of increase of his right, or, as the case may be, charged on such owner in lieu of the diminution of his right, as such majority shall award, or in case the person to or on whom such money payment shall be awarded or charged shall think the sum awarded insufficient, or the sum charged excessive, then as any two justices of the peace shall, upon the complaint of such person, and after summons of the field reeve or one of the field reeves of such pasture (which may be in the form in the schedule to this Act), and on hearing in a summary way the matter in difference, think reasonable and order to be paid; and such order may be in the form in the schedule to this Act; and every

increase or diminution of rights.

such money payment payable in lieu of increase of right shall be paid annually by the field reeve out of the moneys raised by the rate made for the expenses of such regulated pasture; and the money charged on any such owner shall be recoverable as a rate on owners of stints is hereby made recoverable; and all annual payments payable as aforesaid shall be payable on the first Monday in February in every year.

Expenses to be raised by rate.

CXX. And be it enacted, that all salaries and allowances to field reeves and other persons, and all expenses in and about the management of every such regulated pasture, and the repairs and erection of buildings thereon, under the directions of such meetings of owners as aforesaid, and all other expenses of such regulated pasture shall be paid and defrayed by the owners of the respective stints therein; and for that purpose it shall be lawful for the field reeve or one of the field reeves, under the directions of any such meeting of owners, from time to time to make a rate on the respective owners for such sum as the majority of owners present at such meeting shall think requisite; and every such rate shall be apportioned and paid by the owners according to the rule of rating established for such regulated pasture, and shall be paid to the field reeve on demand thereof, and in case the same shall not be paid

within fourteen days after demand thereof, shall be recoverable by distress; and it shall be lawful for any field reeve to exclude from such regulated pasture the stock or animals of any owner or his tenant whose proportion of the rate shall be in arrear and unpaid for fourteen days after demand thereof, until the proportion of such rate so in arrear shall be fully paid; and any such demand or distress may be made of or on the occupier of any such stint as if the occupier were the owner liable to the payment of such rate, and such rate may be paid by any such occupier on demand thereof, and the money so paid by such occupier shall be deemed a payment on account of his rent, and shall be allowed by his landlord accordingly.

Power to apply the Act to pastures already stinted.

CXXI. And be it enacted, that where any land shall be already occupied as a gated or stinted pasture, and any of the persons interested in such gated or stinted pasture whose interests shall not be less in value than two thirds of the whole interest therein, shall be desirous that such gated or stinted pasture should be subject to the provisions of this Act, concerning regulated pastures, without being subject to the other provisions concerning lands subject to be inclosed under this Act, and shall make application in writing to the commissioners to take proceedings for that purpose, it shall be lawful for the commissioners, after

making such inquiries as may appear to them necessary, to cause to be ascertained by any valuer to be appointed or approved by the commissioners for that purpose the proportionate rights and interests of the several persons interested in such pasture, and also the respective rights of pasture to which, having reference to the productiveness of such gated or stinted pasture, the several persons interested therein may, in the judgment of such valuer, be entitled;* and such valuer shall determine and direct, as hereinbefore mentioned, the proportionate liability to rates under this Act of the occupiers of stints or rights of pasture, and in like manner as in case of the conversion into regulated pasture of land subject to be inclosed upon an inclosure under this Act; and the commissioners shall hear or cause to be heard by an assistant-commissioner, any objections to the determinations of claims by and to the report of the valuer respectively, and approve or amend such determinations and such report respectively as they shall think fit; and the valuer, under the direction or with the approval of the commissioners, shall frame and cause to be engrossed an award setting forth such draft award, and the matter of such report, and the commissioners shall confirm the same, with the date of the confirmation, under their hands and seal; and from and after the confirmation

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of such award such gated and stinted pasture shall be subject to all the provisions herein contained concerning land subject to be inclosed, converted into and used as regulated pasture, and shall be rateable under such provisions according to the rule of rating as set forth in such award; and such award shall be as binding and conclusive as if the same had been made and confirmed on an inclosure under this Act.

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Expenses of Inclosures.

Expenses of inclosures.

CXXIV. And be it enacted, that the allowances and payments to be made to and by the valuer, which shall have been audited and approved by or under the directions of the commissioners, and all other the expenses of every

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pay, at least fourteen days before the time appointed for such payment; and the valuer shall from time to time make estimates of all such expenses, and raise the amount of such estimates at such times as he shall, with such approbation of the commissioners deem proper, either before or after the confirmation of the award.

Estimates of expenses to be approved of at public meeting.

CXXV. Provided always, and be it enacted, that before the commissioners shall approve the estimates of such expenses they shall submit the same to a meeting of persons interested, called after seven days' notice, and shall take into consideration any representation with respect to such estimates which may be made to them on the part of the majority of the persons present at such meeting.

Remedies in case of non-payment of expenses.

CXXVI. And be it enacted, that if any person shall refuse or neglect to pay his proportion of such expenses within such time and to such person as the valuer shall appoint, it shall be lawful for the valuer to recover the same, together with lawful interest, to be computed from the day on which the same ought to have been paid, by action at law in his own name in any of her Majesty's courts of record at Westminster, or it shall be lawful for him, by warrant directed to any person whomsoever, to cause the same, with such interest thereon

as aforesaid, to be levied by distress, or it shall be lawful for the valuer, or any person authorized by him, immediately after such neglect or refusal, to enter into and upon the premises so to be allotted to such person, and demise the same, or to demise any stint or right of pasture allotted to such person, and receive the rents and profits thereof respectively, until thereby or otherwise such share or proportion, with lawful interest as aforesaid, and also all the costs and expenses attending such entry upon and demise, and receipt of the rents and profits of the said premises, shall be fully paid and satisfied: provided always, that no such action at law as aforesaid shall be brought by the valuer against any person for his proportion of such expenses as aforesaid, nor shall any proceeding be taken to levy any such proportion of expenses by distress as aforesaid, before the expiration of thirty days after notice in writing that such proportion of expenses is in arrear, and requiring payment thereof, shall have been given to the person liable to pay the same, or left at the usual place of abode of such person.

Power to make additional rate.

CXXVII. Provided always, and be it enacted, that if at any time after the allotments shall have been staked out it shall appear to the valuer, either before or after the confirmation of the award, that the money to arise by

any previous rates will not be sufficient to defray the expenses aforesaid, the deficiency shall, with such approbation of the commissioners as aforesaid, be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be inclosed (except as aforesaid), in such shares and proportions, within such time, and to be paid to such persons as the valuer shall from time to time direct; and in case any persons hereinbefore made subject to the payment of any money toward such expenses shall neglect or refuse to pay his share or proportion of any such rate within the time appointed for that purpose, or at any time after such demand, the same shall be levied and recovered in the manner directed by this Act with respect to the previous rate.

Removal of Valuer.

Commissioners may remove valuers.

CXXVIII. And be it enacted, that if any valuer or surveyor chosen or appointed to act in the matter of any inclosure or other matter under this Act shall, before his duties shall be fully performed, refuse to attend to, or become by sickness or otherwise incapable to act in such matter, or by writing under his hand desire to be discharged from the office of valuer or surveyor respectively, or shall in the judg-

ment of the commissioners neglect his duties, or misconduct himself in his office, or become or be found incompetent or unfit to act as a valuer or surveyor under this Act, it shall be lawful for the commissioners, by order under their hands and seal, to remove him from the office of valuer or surveyor, as the case may be; and if any valuer or surveyor shall be so removed, or shall die, it shall be lawful for the commissioners, by order under their seal, to appoint a valuer or surveyor in his stead, and every valuer and surveyor so appointed shall have the same powers as if he had been chosen at a meeting of the persons interested in the land in manner hereinbefore directed.

Incapacity of Valuer to Purchase.

Valuer not to purchase lands in the parish for seven years after the award.

CXXIX. And be it enacted, that no valuer who shall have acted in the matter of any inclosure shall be capable of being a purchaser of any land within the parish in which the lands to be inclosed, or any part thereof, shall be situate, until the expiration of seven years* after the confirmation of the award in such inclosure.

* By the General Inclosure Act, 41 Geo. 3, c. 109, s. 2, an inclosure commissioner was placed under a similar disability for five years.

*Repayment of Expenses.**

Repayment to consolidated fund.

CXXX. And be it enacted, that it shall be lawful for the commissioners, having regard to the time and labour and expenses of the assistant-commissioners and all other persons, if any, specially employed and paid by the commissioners in or about any inclosure, exchange, division, partition, or other proceeding under this Act, by any order under their hands and seal, to order and declare that a sum, in such order to be mentioned, be paid to the commissioners in respect of the salary, allowance, and expenses of the assistant-commissioners and other persons, if any, so specially employed in or about such inclosure, exchange, division, partition, or other proceeding; and the commissioners shall by such order declare such sum to be charged on the persons interested in the land to be inclosed, or to which such proceeding shall relate, in such shares as they shall think just, and shall appoint a time for payment thereof; and the same shall be raised in the same manner as the expenses of the in-

* It has been noted already (see note to section 25), that the commissioners' power to charge expenses appears to be limited to cases in which inclosures are completed, and does not apply to preliminary inquiries which do not eventuate in an inclosure. Such is the interpretation understood to be put upon this clause by the framers of the bill.

closure, or of subjecting the land to the provisions concerning regulated pasture, are directed to be raised under this Act, and be deemed part of the expenses of the inclosure or matter aforesaid, or, in the case of an exchange, division, or partition, in the same manner as the expenses of such exchange, division, or partition, and when raised shall be paid to the commissioners, who shall forthwith pay the same into her Majesty's Exchequer, to be carried to the account of the Consolidated Fund.

Expenses of Parties.

Persons attending meetings to pay their own expenses.

CXXXI. Provided always, and be it enacted, that the several persons interested in the inclosure or other proceeding under this Act, and their respective agents, shall pay their own expenses whenever they shall attend any of the meetings to be held in the matter of any inclosure.

Expenses of Witnesses.

Expenses of witnesses.

CXXXII. And be it enacted, that the commissioners or assistant-commissioner acting in the matter of any inclosure, or in any inquiry into the expediency or inexpediency of any proposed inclosure, where they or he may see fit, may order such expenses of witnesses, and

such money payment payable in lieu of increase of right shall be paid annually by the field reeve out of the moneys raised by the rate made for the expenses of such regulated pasture; and the money charged on any such owner shall be recoverable as a rate on owners of stints is hereby made recoverable; and all annual payments payable as aforesaid shall be payable on the first Monday in February in every year.

Expenses to be raised by rate.

CXX. And be it enacted, that all salaries and allowances to field reeves and other persons, and all expenses in and about the management of every such regulated pasture, and the repairs and erection of buildings thereon, under the directions of such meetings of owners as aforesaid, and all other expenses of such regulated pasture shall be paid and defrayed by the owners of the respective stints therein; and for that purpose it shall be lawful for the field reeve or one of the field reeves, under the directions of any such meeting of owners, from time to time to make a rate on the respective owners for such sum as the majority of owners present at such meeting shall think requisite; and every such rate shall be apportioned and paid by the owners according to the rule of rating established for such regulated pasture, and shall be paid to the field reeve on demand thereof, and in case the same shall not be paid

within fourteen days after demand thereof, shall be recoverable by distress; and it shall be lawful for any field reeve to exclude from such regulated pasture the stock or animals of any owner or his tenant whose proportion of the rate shall be in arrear and unpaid for fourteen days after demand thereof, until the proportion of such rate so in arrear shall be fully paid; and any such demand or distress may be made of or on the occupier of any such stint as if the occupier were the owner liable to the payment of such rate, and such rate may be paid by any such occupier on demand thereof, and the money so paid by such occupier shall be deemed a payment on account of his rent, and shall be allowed by his landlord accordingly.

Power to apply the Act to pastures already stinted.

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making such inquiries as may appear to them necessary, to cause to be ascertained by any valuer to be appointed or approved by the commissioners for that purpose the proportionate rights and interests of the several persons interested in such pasture, and also the respective rights of pasture to which, having reference to the productiveness of such gated or stinted pasture, the several persons interested therein may, in the judgment of such valuer, be entitled;* and such valuer shall determine and direct, as hereinbefore mentioned, the proportionate liability to rates under this Act of the occupiers of stints or rights of pasture, and in like manner as in case of the conversion into regulated pasture of land subject to be inclosed upon an inclosure under this Act; and the commissioners shall hear or cause to be heard by an assistant-commissioner, any objections to the determinations of claims by and to the report of the valuer respectively, and approve or amend such determinations and such report respectively as they shall think fit; and the valuer, under the direction or with the approval of the commissioners, shall frame and cause to be engrossed an award setting forth such draft award, and the matter of such report, and the commissioners shall confirm the same, with the date of the confirmation, under their hands and seal; and from and after the confirmation

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of such award such gated and stinted pasture shall be subject to all the provisions herein contained concerning land subject to be inclosed, converted into and used as regulated pasture, and shall be rateable under such provisions according to the rule of rating as set forth in such award; and such award shall be as binding and conclusive as if the same had been made and confirmed on an inclosure under this Act.

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Expenses of Inclosures.

Expenses of inclosures.

CXXIV. And be it enacted, that the allowances and payments to be made to and by the valuer, which shall have been audited and approved by or under the directions of the commissioners, and all other the expenses of every

inclosure, except the allowances and salaries to the commissioner who is to have a salary, and to the assistant-commissioners, secretary, clerks, messengers, and officers of the commissioners, and the travelling and other expenses of the commissioners and assistant-commissioners, and except any expenses which the commissioners or assistant-commissioner, or any court under the powers of this Act, shall order to be otherwise paid, shall be borne and defrayed by the several persons interested in the lands to be inclosed (except the surveyors of highways, churchwardens and overseers, and persons to whom lands shall be allotted for public purposes, in respect of the allotments hereinbefore authorized or directed to be made to them respectively) in such shares and proportions, and shall be paid at such time and place, or respective times and places, and to such persons, as the valuer, with the approbation of the commissioners, signified by writing under their hands and seal, shall direct; and such valuer shall give notice requiring payment of the respective shares and proportions of such expenses on the church door, and shall give to all persons so liable, who shall not reside in the parish in which the land inclosed or any part thereof shall be situate, and whose respective places of abode shall be known to the valuer, notice by letter sent by the post of the sums they respectively shall be liable to

pay, at least fourteen days before the time appointed for such payment; and the valuer shall from time to time make estimates of all such expenses, and raise the amount of such estimates at such times as he shall, with such approbation of the commissioners deem proper, either before or after the confirmation of the award.

Estimates of expenses to be approved of at public meeting.

CXXV. Provided always, and be it enacted, that before the commissioners shall approve the estimates of such expenses they shall submit the same to a meeting of persons interested, called after seven days' notice, and shall take into consideration any representation with respect to such estimates which may be made to them on the part of the majority of the persons present at such meeting.

Remedies in case of non-payment of expenses.

CXXVI. And be it enacted, that if any person shall refuse or neglect to pay his proportion of such expenses within such time and to such person as the valuer shall appoint, it shall be lawful for the valuer to recover the same, together with lawful interest, to be computed from the day on which the same ought to have been paid, by action at law in his own name in any of her Majesty's courts of record at Westminster, or it shall be lawful for him, by warrant directed to any person whomsoever, to cause the same, with such interest thereon

as aforesaid, to be levied by distress, or it shall be lawful for the valuer, or any person authorized by him, immediately after such neglect or refusal, to enter into and upon the premises so to be allotted to such person, and demise the same, or to demise any stint or right of pasture allotted to such person, and receive the rents and profits thereof respectively, until thereby or otherwise such share or proportion, with lawful interest as aforesaid, and also all the costs and expenses attending such entry upon and demise, and receipt of the rents and profits of the said premises, shall be fully paid and satisfied: provided always, that no such action at law as aforesaid shall be brought by the valuer against any person for his proportion of such expenses as aforesaid, nor shall any proceeding be taken to levy any such proportion of expenses by distress as aforesaid, before the expiration of thirty days after notice in writing that such proportion of expenses is in arrear, and requiring payment thereof, shall have been given to the person liable to pay the same, or left at the usual place of abode of such person.

Power to make additional rate.

CXXVII. Provided always, and be it enacted, that if at any time after the allotments shall have been staked out it shall appear to the valuer, either before or after the confirmation of the award, that the money to arise by

have been entitled to the rents and profits of the said land, be applied to the following purposes or any of them; (that is to say),

The redemption or discharge of the land tax or of any debt or other incumbrance affecting the same land, or affecting other lands standing settled therewith to the same or the like uses or trusts:

The purchase of other land, to be conveyed or settled upon the like uses or trusts, or such of them as shall be then existing undetermined or capable of taking effect.

Payment of dividends in the mean time.

CXXXIX. And be it enacted, that in the mean time and until such application shall be made the said money may, by order of the said court, to be made upon the like petition, be invested by the said Accountant-General in his name in the purchase of Three pounds per centum Consolidated or Three pounds per centum Reduced Bank Annuities, or of government securities; and the dividends or interest of such annuities or securities shall from time to time be paid, by order of the said court, to the parties who would for the time being have been entitled to the rents and profits of the lands so to be purchased, conveyed, and settled.

Application

CXL. And be it enacted, that in case the

surplus of any such moneys as aforesaid shall be less than the sum of two hundred pounds, and shall exceed or amount to the sum of twenty pounds, the same shall, at the option of the parties who for the time being would have been entitled to the rents and profits of the said land, or their guardians or committees, in case of infancy, idiotcy, lunacy, or other incapacity, with the approbation of the commissioners, to be signified in writing under their seal, be paid into the Bank of England in the name and with the privity of the said Accountant-General of the Court of Chancery, and be placed to his account as aforesaid, in order to be applied in manner hereinbefore directed; or otherwise the same may be paid, at the like option and with the like approbation, to two trustees, to be nominated by the said parties, who for the time being would have been entitled to the rents and profits of the said land as aforesaid, such nomination to be approved of by the commissioners, and such nomination and approbation to be signified in writing under the hands (or common seal, as the case may be,) of the nominating parties, and under the seal of the commissioners; and in any case in which such moneys shall amount to or exceed the sum of two hundred pounds, the same, if the commissioners shall so think fit and direct, shall in like manner be paid to trustees to be nomi- of money under 200*l.*

nated and approved as aforesaid; and the money so paid to such trustees, and the dividends and produce arising therefrom, shall be by them applied in like manner as is hereinbefore directed with respect to money so to be paid into the Bank of England, but without obtaining or being required to obtain any order of the said court touching the application thereof.

Under 20*l.*

CXLI. And be it enacted, that in case the surplus of any such moneys as aforesaid shall be less than twenty pounds the same shall be paid to the parties for the time being entitled to the rents and profits of the said land, for their own use and benefit; or in case of infancy, idiotcy, lunacy, or other incapacity, then such money shall be paid to their guardians, committees, or trustees, for the use and benefit of the parties respectively entitled thereto.

Sale of Land for Expenses.

Sale of land by valuer for expenses.

CXLII. Provided always, and be it enacted, that in case the valuer acting in the matter of any inclosure shall, under the instructions hereinbefore required in this behalf, proceed to raise all or any part of the expenses of the inclosure by sale of part of the land proposed to be inclosed, such valuer shall set out such

parts of the land to be inclosed as he shall judge sufficient in value to defray the expenses aforesaid, and shall, from time to time as he shall find expedient, sell and dispose of the same by public auction or by private contract, with the approbation of the commissioners; and the purchase-moneys to arise by such sales shall be paid into the hands of the commissioners, or as they shall direct, and shall be by them applied in discharging the said expenses.

Conveyances to be made by commissioners.

CXLIII. And be it enacted, that upon every sale to be made by the valuer under the provisions of this Act the commissioners shall sign and deliver to each purchaser a receipt for his purchase-money, which shall be a sufficient discharge for the same; and upon receipt of the whole purchase-money for any of the lands which shall be sold as aforesaid the commissioners shall convey such lands, and the fee simple and inheritance thereof in possession, by conveyance under their hands and seal, to such uses and in such manner as such purchaser shall direct; and after such conveyance the premises conveyed shall be freehold of inheritance, and shall be held to the uses and in manner expressed by such conveyance; and any such conveyance may be to the effect set forth in the schedule to this Act, and shall be evidence of the regularity of the

sale in pursuance of which such conveyance shall be made.

Application of purchase-moneys.

CXLIV. And be it enacted, that all such purchase-moneys as shall be from time to time raised or received by the commissioners by such respective sales as aforesaid shall, after payment of the charges and expenses attending such respective sales, be paid and applied by the commissioners towards the expenses of the inclosure; and the respective purchasers or other persons paying the same shall not in any manner be liable to see to the application, or be answerable for any misapplication thereof.

*Notice of Proceedings to be given to Reversioners.**

Notice may be given to reversioners.

CXLV. And be it enacted, that the commissioners, before authorizing or certifying the expediency of any inclosure, or determining any claim or matter, or approving any report or award, or in any other stage of the proceedings on any inclosure, or of the proceedings for subjecting any gated or stinted pas-

* It is understood that the commissioners will require that actual notice be given to reversioners wherever they are known or can be discovered by diligent inquiry. After they are satisfied that due diligence has been used, a public notice may be held sufficient.

ture to the provisions of this Act concerning regulated pastures, if they shall see occasion, may require notice to be given, in any such manner as they shall direct, to the person next in remainder, reversion, or expectancy of an estate of inheritance in any lands, or to any other person to whom they may think notice ought to be given, and may by themselves or by some assistant-commissioner hear and determine any objection which may be made by the person so next in remainder, reversion, or expectancy.

Custody of Award.

Copies of award to be made and deposited.

CXLVI. And be it enacted, that two copies of every confirmed award shall be made, and sealed with the seal of the said commissioners, and one such copy shall be deposited with the clerk of the peace of the county in which the lands inclosed shall be situate, who is hereby required to deposit and keep the same among the records of the said county, so that recourse may be had thereto by any person interested in the premises, and the other copy shall be deposited with the church or chapel wardens for the time being of the parish in which the lands or the greater part thereof shall be situated, to be kept by them and their successors in office with the public books, writings, and papers of the parish, or shall be deposited

with such other fit persons as the commissioners shall approve; and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy, on giving reasonable notice to the person having custody of the same, and on payment of two shillings and sixpence for such inspection, and after the rate of threepence for every seventy-two words contained in such copy or extract; and all such copies of and extracts from any such copy of any confirmed award as shall be furnished by the clerk of the peace shall be signed by the said clerk of the peace or his deputy, purporting the same to be a true copy; and every such copy and extract, so signed, shall be received in evidence without further proof thereof; and every recital or statement in such confirmed award or any sealed copy thereof shall be deemed satisfactory evidence of the matters therein recited or stated.

*Exchanges of Lands not subject to be inclosed.**

Exchanges may be made of

CXLVII. And be it enacted, that it shall be lawful for the commissioners, upon the ap-

* Copyholds and customary lands were excluded from the operation of this section. But, by 9 & 10 Vict. c. 7, s. 9, the provisions as to partition and exchange are extended to copyhold and customary lands; and, by 12 & 13 Vict. c. 83, s. 8, these provisions are further extended to

plication in writing of the persons interested, according to the definition hereinbefore contained, in lands not subject to be inclosed under this Act, or in lands subject to be inclosed under this Act as to which no proceedings for an inclosure shall be pending, and who shall desire to effect an exchange of lands in which they respectively shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners* of such respective lands; and in case the commissioners shall be of opinion that such exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall, unless notice of dissent to the proposed exchange shall be given, under the provision hereinafter contained, cause to be framed, and confirmed under the hands and seal of the commissioners, an order of exchange, with a map or plan thereunto annexed, in which order shall be specified and shown the lands given and taken in exchange by each person so interested respectively; and a copy of such order, under

land not subject to be inclosed.

See Page 133

rights of common, rights of fishing, manorial and other rights, easements, quit rents, heriots, tithes, and rentcharges.

By 11 & 12 Vict. c. 99, the provisions as to exchanges are extended to the partition of lands held in undivided shares.

* By sect. 11 of the 12 & 13 Vict. c. 83, lands held under separate titles by the same person may be exchanged.

the seal of the commissioners, shall be delivered to each of the parties on whose application the exchange shall have been made; and such order of exchange shall be good, valid, and effectual in the law to all intents and purposes whatsoever, and shall be in nowise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be and enure to, for, and upon the same uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the lands given on such exchange would have stood limited or been subject to in case such order had not been made; and all expenses with reference to such order and exchange, or the inquiries in relation thereto, or to any proposed exchange, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken: provided always, that no exchange shall be made of any land held in right of any church or chapel or other ecclesiastical benefice, without the consent, testified in writing, of the bishop of the diocese and the patron of such benefice.*

* The Amendment Act, 10 & 11 Vict. c. 111, s. 4, provides that exchanges under this Act may reserve mines and minerals, and also rights of way and other easements.

*Division of intermixed Lands, not subject to be inclosed.**

CXLVIII. And be it enacted, that it shall be lawful for the commissioners, upon the application in writing of any number of persons who shall be separately interested in parcels of land not subject to be inclosed under this Act or of land subject to be inclosed under this Act as to which no proceedings for an inclosure shall be pending, so intermixed or divided into parcels of inconvenient form or quantity that the same cannot be cultivated or occupied to the best advantage, but forming together a tract which may be divided into convenient parcels, and who shall desire to have the whole of such tract divided into convenient parcels, to be allotted in lieu of the old parcels, to direct an inquiry whether such proposed division and allotment would be beneficial to the owners of such lands; and in case the commissioners shall be of opinion that the proposed division and allotment would be beneficial, they shall, unless notice of dissent from the proposed division and allotment shall be given, under the provisions hereinafter contained, cause to be framed an order

Division of intermixed lands.

* The commissioners, by the 11 & 12 Vict. c. 99, s. 13, have power to effect a partition of lands held in undivided shares. See page 104.

the seal of the commissioners, shall be delivered to each of the parties on whose application the exchange shall have been made; and such order of exchange shall be good, valid, and effectual in the law to all intents and purposes whatsoever, and shall be in nowise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be and enure to, for, and upon the same uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the lands given on such exchange would have stood limited or been subject to in case such order had not been made; and all expenses with reference to such order and exchange, or the inquiries in relation thereto, or to any proposed exchange, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken: provided always, that no exchange shall be made of any land held in right of any church or chapel or other ecclesiastical benefice, without the consent, testified in writing, of the bishop of the diocese and the patron of such benefice.*

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Division of intermixed lands.

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* The commissioners, by the 11 & 12 Vict. c. 99, s. 13, have power to effect a partition of lands held in undivided shares. See page 104.

for the division or allotment thereof accordingly, with a map or plan thereunto annexed, in which shall be specified, as well the parcels which the several persons on whose application such order shall have been made were respectively interested in before such division and allotment, as the several parcels allotted to them respectively by such order, and such order shall be confirmed under the hands and seal of the commissioners; and a copy of such order, sealed with the seal of the commissioners, shall be delivered to each of the parties on whose application the division and allotment shall have been made; and such order of division shall be good in the law to all intents and purposes whatsoever, and shall in nowise be liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the parcels of land taken by the persons interested under such division shall be and enure to, for, and upon the same uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the several lands which the persons taking the same shall have relinquished or lost on such division would have stood limited to, for, or upon, or been subject to, in case such order had not been made; and all expenses with reference to any such order, division, and allotment, or the inquiries in

relation thereto, or to any proposed division or allotment, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken.

Exchange of Allotments for Poor and for Public Purposes.

Inconvenient allotments for the poor and public purposes may be exchanged for land more convenient.

CXLIX. And be it enacted, that where, under the powers of any Inclosure Act, any allotment shall have been made in trust for the poor inhabitants of any parish, or of any class of such poor inhabitants, or in trust to be leased, used, or enjoyed to or by or upon any other trusts for the benefit of such poor inhabitants, or for the purposes of exercise and recreation, or for any other public or parochial purpose, and it shall appear to the commissioners that such allotment, by reason of its distance from the dwellings of such poor inhabitants, or from the nature or quality of the soil, or otherwise, shall not be convenient or suitable for the purposes for which the same shall have been made, it shall be lawful for the commissioners, upon the application in writing of the churchwardens and overseers of the poor of the parish in which such allotment shall be situate, or of the trustees for the time being of such allotment, and of the person interested in land more convenient or suitable for the purposes

for which such allotment shall have been made, and who may be willing to give such land in exchange for such allotment, in case the commissioners shall be of opinion that such exchange would be beneficial to the poor inhabitants or other persons for whose benefit or more suitable to the purposes for which such allotment was made, to cause to be framed and to confirm an order of exchange of such allotment for such other land as aforesaid; and the provisions herein contained concerning exchanges shall apply to such allotment as if such churchwardens and overseers or trustees respectively were the persons interested in such allotment.

Notice of Exchanges.

Notices of such exchanges and divisions to be given.

CL. Provided always, and be it enacted, that no such order of exchange or order of division and allotment as aforesaid shall be confirmed by the commissioners until notice shall have been given by advertisement in three successive weeks of such proposed exchange or division and allotment, and three calendar months shall have elapsed from the publication of the last of such advertisements; and in case before the expiration of such three calendar months any person entitled to any estate in or to any charge upon any land included in such proposed exchange or division

and allotment shall give notice in writing to the commissioners of his dissent from such proposed exchange or division and allotment, as the case may be, the commissioners shall not confirm an order for such exchange or such division or allotment, unless such dissent shall be withdrawn, or it shall be shown to the commissioners that the estate or charge of the party so dissenting shall have ceased.

Expense of Exchanges.

Expenses of exchanges and divisions.

CLI. And be it enacted, that if any difference shall arise touching the said expenses in relation to any exchange, division, allotment, orders, or inquiries as aforesaid, or the share thereof to be paid by any person, it shall be lawful for the commissioners to certify under their hands and seal the amount to be paid by such person; and in case any person shall neglect or refuse to pay his share so certified to be payable by him, and upon the production of such certificate before any two justices of the peace for the county or other jurisdiction wherein the land shall be situate, such justices, upon the non-payment thereof, are hereby required, by warrant under their hands and seals, to cause the same to be levied by distress.

for or under which any lands therein mentioned should be held, or shall not have duly distinguished the lands which after such award should remain subject to all or any tithes, and the lands which should be discharged from all or any tithes, or where by any such award an aggregate allotment shall have been set out and awarded in any case in which several and distinct allotments ought to have been set out and awarded, in every such case, and in every other case in which it shall appear to the commissioners that inconvenience shall have arisen from inaccuracy, confusion, or omission in any such award, it shall be lawful for the commissioners, upon the application in writing of any person interested in the lands to which such award may relate, or of any person prejudiced by the inaccuracy, confusion, or omission in such award, to make such inquiries and take such evidence, by themselves or by an assistant-commissioner, as they shall think fit, and by an order under their hands and seal to amend such award, and to distinguish the several tenures of the lands thereby allotted and awarded, and the different estates or titles for or under which the same should be held, and to distinguish the lands which should be discharged from all or any tithes, and the lands which should remain subject to all or any tithes, and to subdivide aggregate allotments into separate allotments, and to distinguish the

tenures or titles thereof, or the lands or rights in respect of which they were respectively made, and generally to make or give such declarations or directions as may appear necessary to supply any omission and rectify any inaccuracy or confusion in such award; and such order of the commissioners shall have the same force and effect as if the allotments, directions, and declarations therein contained had been duly made and contained in the original award, in addition, or, as the case may require, in substitution for the parts thereof to which such amendments may relate; and all expenses with reference to such order as last aforesaid, and of and consequent upon all inquiries in relation thereto, or to any proposed amendment of any such award, shall be borne by the persons on whose application such order shall be made or such inquiries undertaken.

Remedy of defective Proceedings under Local Inclosure Acts. *

Commissioners may revive powers under

CLIII. And be it enacted, that where under any local Act of Inclosure the powers and au-

* In the first imprint of this bill, these words stood "shall have been lost *or supposed to have been lost.*" The omission of the last six words lets in the doubtful question as to when the powers of a commissioner under a local Inclosure Act are actually determined by the ex-

local inclosure acts lost by lapse of time, or otherwise.

thorities originally vested in the commissioner or commissioners acting under any such local Act, or any such power or authority, shall not have been fully executed according to the intent of such local Act, and shall have been lost or become incapable of being executed by reason of the neglect or omission to execute the same, or to take some proceeding necessary to the due execution thereof within the time limited in that behalf by such local Act, or from any other cause whatsoever, it shall be lawful for the inclosure commissioners for England and Wales, by any order under their hands and seal, to authorize the commissioner or commissioners appointed by or acting under the authority of such local Act to execute and to

piration of the time within which the publication of the award is directed by the Act.

In *Haggerstone* v. *Dugmore*, 1 B. & Ald. 82, an inclosure commissioner was held to have the power of levying rates for expenses four years after his award had been published, Holroyd, J., saying that "the power of the commissioners must, from the reason of the thing, continue till they have fully executed the duty imposed upon them by the Act." It does not, however, appear from the report of this case whether any time was limited by this particular Act; the argument relied upon by counsel being, that the office of the commissioner ceased on the publication of his award.

In the case of arbitrators, it is certain that their authority determines upon the expiration of the time limited. See the cases collected in Watson on Arbitrations, p. 106; but I am not aware of any decisions exactly in point on the subject of inclosure commissioners.

carry into effect the powers and authorities originally vested in such last-mentioned commissioner or commissioners, or in any previous commissioner or commissioners under such local Act, in the same manner as if such powers and authorities had not been lost or become incapable of being executed, or as near thereto as lapse of time and other circumstances may permit, and subject to such conditions and restrictions as the justice of the case may appear to require, and in and by such order to direct any act or proceeding to be done or taken in substitution for any act or proceeding which shall have been required or directed by such local Act, and which shall have become incapable of being done or taken by lapse of time or other circumstances; and all proceedings, adjudications, orders, directions, and acts taken, made, and done by the commissioner or commissioners under any local Act, in pursuance of any such order as aforesaid of the inclosure commissioners for England and Wales, shall have the same force and effect as if the same had been duly authorized by such local Act; and the expenses of such order, and of the inquiries in relation thereto, shall be paid by the commissioner or commissioners acting under such local Act, and shall be deemed expenses under the inclosure by such local Act authorized.

Commissioners may appoint persons to complete proceedings in an imperfect inclosure.

CLIV.* And be it enacted, that where the powers and authorities of any local Act of inclosure shall not have been fully executed and performed, whether the same shall or shall not have been lost or have become incapable of being executed from lapse of time or otherwise, and there shall be no commissioner acting under such local Inclosure Act, or in case from any other cause any of the persons interested in the land to which such local Act shall relate shall be desirous that the powers and authorities of such Act should be executed, and the proceedings thereunder completed under the direction of the inclosure commissioners for England and Wales, it shall be lawful for the said commissioners, by order under their hands and seal, upon the application in writing of the major part in value of the persons interested in the lands subject to be inclosed under such local Act, to appoint any person to execute the powers or authorities of such local Act, in the place of the commissioner or commissioners by

* This section provides a very wholesome check upon the hitherto irresponsible powers of an inclosure commissioner. The effect is to enable the inclosure commissioners to discharge the commissioner named in any local Act, and to appoint another, upon request of the major part in value of the persons interested in the commons. This section may hasten the completion of many long-delayed awards.

The provisions of this section are extended to the Common Fields Act by the 4th sect. of the 12 & 13 Vict. c. 83.

such Act appointed or authorized to be appointed, and to complete the proceedings under the same; and it shall be lawful for the said inclosure commissioners for England and Wales by such order as aforesaid, or by any supplemental or other order, to authorize the person so appointed to execute and to carry into effect any powers or authorities originally vested in any commissioner or commissioners under such local Act, and which may have been lost or become incapable of being executed, and to give such other directions in relation thereto as under the provision hereinbefore contained might have been given to the commissioner or commissioners appointed by or acting under a local Act; and the person so appointed by the commissioners shall and may complete the proceedings under such local Act, and make an award therein, and shall have such and the like powers and authorities in all respects as the commissioner or commissioners originally appointed by or acting under such local Act would have had if he or they had continued to act; and it shall be lawful for the inclosure commissioners for England and Wales, by order under their hands and seal, to remove any person so appointed, and upon such removal, or in case any person so appointed shall die, or desire to be discharged from his office, before the proceedings in such inclosure shall be completed, from time to time to appoint

any other person in his stead, with all such powers and authorities as aforesaid; and the expenses of such orders of the commissioners, and of all proceedings in relation thereto, shall be expenses in the inclosure, and raised in the same manner as other expenses may by such local Act be authorized to be raised.

Commissioners to give notice before proceeding to amend awards under local act.

CLV. Provided always, and be it enacted, that the commissioners shall not in any case proceed to amend any award under any local Act of inclosure, or under the said Act of the seventh year of the reign of King William the Fourth, or to authorize the execution of any power or authority under any such local Act which shall have been lost or become incapable of being executed as aforesaid, or to authorize any person to be by them appointed as aforesaid to execute the powers or authorities of any local Act in the place of the commissioner or commissioners appointed under such local Act, until notice of the application to the commissioners to amend such award, or to authorize the execution of such powers or authorities, or to authorize any person to be by them appointed as aforesaid, shall have been given by advertisement in four successive weeks; and in case within two calendar months after the publication of the last of such advertisements one fourth part in number or value of the persons interested, according to the defi-

nitions hereinbefore contained, in the land to which the award so proposed to be amended, or the part thereof proposed to be amended, shall relate, or in the land to be affected by the exercise of such powers or authorities, shall give notice in writing to the commissioners of their dissent from such application, the commissioners shall not proceed further on such application.*

Proviso for cases where dealings have been had with land on faith of inaccuracies, &c., proposed to be rectified.

CLVI. Provided also, that in every case in which dealings shall have been had with such land, or some part thereof, on the faith of the inaccuracy, confusion, or omission which it shall be proposed to rectify or supply, or on the faith of such powers or authorities having been lost or become incapable of being executed, or on the faith of the powers or authorities of such local Act not being executed under the powers of such local Act, or the actual possession of the land, or the receipt of the rents and profits of the land, to which the award so proposed to be amended, or the part thereof proposed to be amended, shall relate, or, as the case may be, the possession of the land, or the receipt of the rents and profits of the land, to be affected by the exercise of such powers or authorities, would be

* This section is repealed by the Amendment Act, 10 & 11 Vict. c. 111, s. 5. The proceedings are now assimilated to other inclosure proceedings under the Act.

altered by the proposed amendment of the award, or by the exercise of such powers or authorities as aforesaid, the commissioners shall not proceed on such application, so far as respects the land with which such dealings may have been had, or of which the possession or the receipt of rents and profits would be altered as aforesaid, without the consent of the persons interested in such last-mentioned land, nor shall the commissioners proceed in any case upon such application, so far as respects such last-mentioned land, in case within two calendar months after the publication of the last of such advertisements as aforesaid any person entitled to any estate in or to any charge upon such last-mentioned land shall give notice in writing to the commissioners of his dissent from such application.

Confirmation of Awards under Common Fields Act.

Commissioners may confirm awards or agreements made under supposed authority of 6 & 7 W. 4, c. 115.

CLVII. And be it enacted, that where by any award or agreement expressed to be made under the authority of the said Act of the seventh year of King William the Fourth, intituled "An Act for facilitating the Inclosure of Open and Arable Fields in England and Wales,"* any moors, commons, or waste lands,

* There is no power under this Act to confirm agreements made among the commoners for the inclosure of

or other lands not subject to be inclosed under the provisions of such last-mentioned Act, shall have been inclosed or apportioned and allotted, and the lands so inclosed or apportioned and allotted shall be within the definition of lands subject to be inclosed under this Act, it shall be lawful for the commissioners, upon the application of any person interested in any land so inclosed or apportioned and allotted, to make such inquiries in relation to such award or agreement as the commissioners shall think fit; and if it shall appear to the commissioners that the rights and interests of all parties interested in the lands expressed to be inclosed or apportioned and allotted by such award or agreement shall have been duly provided for and compensated thereby, or might be duly provided for and compensated thereby if such award or agreement were confirmed, or amended and confirmed, as hereinafter mentioned, it shall be lawful for the commissioners, by any order under their hands and

wastes. The instances are not rare throughout the country in which commons have been thus inclosed, and the inclosers trust to a future efflux of time to make them a title. It would surely have been well if this Act had conferred a power upon the commissioners to confirm such agreements (after due inquiry), just as the tithe commissioners have power to confirm invalid compositions real. At present such parties must go through the usual forms, call upon the commissioners to inclose and obtain the provisional order, sanction of parliament, and award, before they can gain a marketable title.

seal, to confirm such award or agreement, or to amend the same, as the justice of the case and the rights and interests of the parties may appear to the commissioners to require, and to confirm the same, with the amendments specified in such order, as the commissioners shall think fit; and every award and agreement so confirmed shall, with the amendments, if any, which shall have been made by such order, have the same force and effect as a final award under the authority of this Act; and all expenses with reference to such order as last aforesaid, and of all inquiries in relation thereto, or to any proposed confirmation of any such award or agreement, shall be borne by the persons interested in the lands by such award or agreement inclosed or apportioned and allotted, in such proportions as the commissioners shall direct: provided always, that the commissioners shall not confirm any such award or agreement, or proceed to make any inquiries in relation thereto, unless it shall be made to appear to the commissioners that the persons making the application for a confirmation of such award or agreement represent at least one third in value of the interests in such lands.*

* By the 12 & 13 Vict. c. 83, s. 14, all the provisions enabling the commissioners to complete proceedings under any local Inclosure Act are extended to proceedings commenced under the Common Fields Act.

Trustees under Local Acts.

CLVIII. And be it enacted, that where, under any local Act of Inclosure, or under any award made under the authority of any local Act of Inclosure, provision shall have been made for the election, from among persons having certain qualifications in respect of property or otherwise, of a number of trustees or other functionaries for making or maintaining works on the lands inclosed, or for any other local functions, and it shall appear to the commissioners that by reason of alterations in the state of property or otherwise persons cannot be found according to the qualifications required by such local Act of Inclosure to fill up the number of trustees or other functionaries required by such local Act, it shall be lawful for the commissioners, after such inquiries as they shall think fit, upon the request and at the expense of any persons interested in the works to be made or maintained, or in the functions to be performed by such trustees or functionaries, by order under the seal of the commissioners to declare that any such lesser number, in such order to be mentioned, of trustees or other functionaries, may be from time to time elected for the purposes or be competent to exercise and perform the powers and functions in such local Act of Inclosure

Power to reduce the number of trustees under local act where a sufficient number of persons qualified cannot be found.

required or authorized to be exercised by the number of trustees or other functionaries directed to be elected by such local Act, and such lesser number shall be from time to time elected, and shall be competent to exercise and perform such powers and functions accordingly.

Penalties and forfeitures how recoverable.

CLIX. And be it enacted, that all penalties and forfeitures imposed by this Act, or which shall be imposed by the commissioners or assistant-commissioner acting in the matter of any inclosure or other proceeding under or by virtue of the authority of this Act, shall be levied and recovered before any two justices of the peace for the county in which the land subject to be inclosed, or to which such other proceeding shall relate, shall be situate, and not interested in the matter in question, for which purpose it shall be lawful for any such justices of the peace, upon complaint made to them, to summon the party accused and the witnesses on both sides, and upon the appearance or contempt of the party accused to examine such witnesses upon oath (which oath such justices are hereby empowered to administer), and upon such evidence to give judgment accordingly, and to condemn the party accused (proof of the accusation being made by one or more witness or witnesses as aforesaid) in such penalties and forfeitures as the

offender shall have incurred, and to levy such penalties and forfeitures by distress, together with reasonable costs; all which penalties and forfeitures the application whereof is not particularly directed by this Act shall, and so soon as the same shall be levied, be paid and applied to and for such uses, intents, or purposes as the commissioners in and by any writing under their hands and seal shall order, direct, or appoint.

Distress.

Distress, how to be made.

CLX. And be it enacted, that when in this Act any sum of money, whether in the nature of penalty or otherwise, shall be directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the party liable to pay the same; and the surplus moneys arising from such sale, after satisfying such sum of money, and the costs and expenses attending the distress and sale shall, on demand, be rendered to the party whose goods and chattels shall have been distrained.

Distress not unlawful for informality.

CLXI. And be it enacted, that no distress levied by virtue of this Act shall be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the warrant of distress

or other proceeding relating thereto, nor shall such party be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action upon the case.

General Provision as to Notices.

Notices, how to be given.

CLXII. And be it enacted, that all notices by this Act directed to be given by advertisement shall be given by an advertisement to be inserted in some newspaper or newspapers printed or usually circulated in the county in which the land subject to be inclosed, or other land to which such notice shall relate, shall be situate; and all notices directed to be given on the church door shall be by writing under the hand of the party giving such notice, to be affixed on the principal outer door of the church of every parish and ecclesiastical district in which the land subject to be inclosed, or other land to which such notice shall relate, or any part thereof, shall be situate, on Sunday before divine service, or where in any such parish or ecclesiastical district there shall be no church, then to be affixed in some conspicuous place of such parish or ecclesiastical district on Sunday before ten of the clock in the forenoon; and all notices necessary to be given by the com-

missioners or any assistant-commissioner or valuer acting in the matter of any inclosure (the mode of giving which is not hereby particularly directed) shall be by either or both of the methods aforesaid, as the commissioners or assistant-commissioner or valuer respectively shall think fit; and all notices so given shall be deemed sufficient notices to all persons concerning all matters and things to which such respective notices shall relate.*

Advertisements.

Advertisements, awards, &c., free of duty.

CLXIII. And be it enacted, that no advertisement inserted by direction of the commissioners or any assistant-commissioner acting in the matter of any inclosure in the *London Gazette* or in any newspaper for the purpose of carrying into effect any provision of this Act, and no agreement, award, bond, or power of attorney made or confirmed or used under this Act, shall be chargeable with any stamp duty.

Punishment of Witnesses misbehaving.

Persons giving false evidence, &c., to be guilty of a misdemeanor.

CLXIV. And be it enacted, that if any person under the provisions of this Act shall wilfully give false evidence, or shall make or

* The Amendment Act, 10 & 11 Vict. c. 111, s. 8, provides that these notices may be given by the secretary or other person lawfully deputed.

subscribe a false declaration for the purposes of this Act, or shall wilfully refuse to attend in obedience to any lawful summons of the commissioners or an assistant-commissioner or valuer, or to give evidence, or shall wilfully alter, withhold, destroy, or refuse to produce any book, court roll, or writing, map, plan, or survey, or any copy of the same, which may be lawfully required to be produced before the commissioners or assistant-commissioner or valuer, he shall be deemed guilty of a misdemeanor.

Limitation of Actions.

Limitation of actions.

CLXV. And be it enacted, that no action or suit shall be commenced against any commissioners, assistant-commissioner, justice of the peace, valuer, or other person, for any thing done under the authority of this Act, until two calendar months' notice thereof shall have been given in writing to the party against whom such action or suit is intended to be brought, or after sufficient satisfaction or tender of amends shall have been made to any party aggrieved, or after twelve calendar months shall have expired from the commission of the act for which such action or suit shall be so brought, or in case there shall be a continuance of damages then within twelve calendar months next after the doing or committing

of such damage shall have ceased; and every such action shall be brought, laid, and tried in the county or place where the cause of action shall have arisen, and not in any other county or place; and if it shall appear that such notice of action or suit was brought before two calendar months' notice thereof given as aforesaid, or that sufficient amends were made or tendered as aforesaid, or if any such action or suit shall not be commenced within the time before limited in that behalf, or such action shall be laid in any county or place other than as aforesaid, then the jury shall find a verdict for the defendant therein, or the court, upon summary application by motion in any such suit, may dismiss the same against such defendant; and if a verdict shall be found for such defendant, or such suit shall be dismissed upon application as aforesaid, or if the plaintiff in such action or suit shall become nonsuit, or suffer a discontinuance of such action, or if upon any demurrer in such action or suit judgment shall be given for the defendant therein, then such defendant shall have costs, charges, and expenses as between attorney and client.

Certiorari.

CLXVI. And be it enacted, that no order, adjudication, or proceeding made or had by or

Proceedings not to be removed by certiorari.

before the commissioners or any assistant-commissioner under the authority of this Act, except as hereinbefore provided, or any proceeding to be had touching any offender against this Act, shall be quashed for want of form or be removed or removable by certiorari or any other writ or process into any of her Majesty's courts of record at Westminster, or elsewhere.

Interpretation.

Interpretation clause.

CLXVII. And be it enacted, that in the construction and for the purposes of this Act, unless there be something in the subject or context repugnant to such construction, the word "person" shall mean and include the Queen's Majesty, and any body corporate, aggregate or sole, as well as an individual; any word importing the singular number only shall mean and include several persons or parties as well as one person or party, and several things as well as one thing respectively, and the converse; any word importing the masculine gender only shall mean and include a female as well as a male; the word "inclosure" shall extend to and include division or allotment; the word "inclose" and its conjugates shall include the meaning also of the words "divide" and "allot" and their respective conjugates; and the words "local act of inclosure" shall extend to and include any local act of which

inclosure, division, or allotment of lands shall have been one of the objects or purposes; the word "manor" shall extend to and include any hundred, honour, or lordship; the word "land" shall mean and include all messuages, lands, and corporeal tenements and hereditaments; the word "county" shall include any riding or other like division of a county, and any liberty, city, or place having a separate commission of the peace; the word "parish" shall include any township or vill or hamlet having separate overseers of the poor, or extra-parochial district or place; the word "church" shall mean and include any chapel where there is no church; the word "schoolhouse" shall mean any parochial or charitable schoolhouse; the words "the commissioners" shall mean the inclosure commissioners for England and Wales; and the words "assistant-commissioner" shall mean the assistant-commissioner appointed by the inclosure commissioners.

Extent of Act.

CLXVIII. And be it enacted, that this Act shall extend only to England and Wales.

Alteration of Act.

CLXIX. And be it enacted, that this Act may be amended or repealed by any Act to be passed in this present session.

The SCHEDULE to which this Act refers.

Form of Conveyance by Commissioners.

In the matter of the inclosure.

WE the inclosure commissioners for England and Wales, by virtue of an Act of Parliament passed in the year of the reign of Queen Victoria, intituled [*here insert the title of this Act*], and in consideration of the sum of paid into our hands by being the purchase-money of the hereditaments hereinafter described, do by these presents convey unto his heirs and assigns, all that [*here describe the premises*], with the appurtenances, to hold the same unto the said his heirs and assigns [*here state the uses, trusts, or purposes of the conveyance, as the case may require*]. In witness whereof we have hereunto affixed our seal, this day of .

Form of Summons.

To of in the county of field reeve of .

to wit. } I esquire, one of Her Majesty's justices of the peace in and for the said county of

do hereby summon you personally to be and appear before such two of Her Majesty's justices of the peace as shall be present at in the said county on the day of next, at the hour of in the noon of the same day, to answer the complaint of *A. B.* that [he is refused reasonable compensation for diminution of his right of pasture in the regulated pasture in], *or* [that the said *A. B.* is charged with an excessive payment for increase of his right of pasture in the regulated pasture of], otherwise the complaint will be proceeded with as if you had appeared. Given under my hand and seal, this day of in the year .

Form of Order.

to wit. } The order of and esquires, two of Her Majesty's justices of the peace in and for the said county, made at in the said county of the day of in the year .

WHEREAS complaint hath been made to us by *A. B.* for that he [*state the complaint as in the summons*]; we do declare

that [the yearly sum of is a reasonable compensation for the diminution of the right of pasture of the said *A. B.*] *or* [the yearly sum of is a reasonable payment for increase of the right of pasture of the said *A. B.*], and do order that such yearly sum be paid, according to the directions of the statute in that behalf. Given under our hands and seals, this day of in the year .

9 & 10 VICTORIÆ REGINÆ.

CAP. LXX.

An Act to amend the Act to facilitate the Inclosure and Improvement of Commons. [*26th August*, 1846.]

WHEREAS an Act was passed in the eighth and ninth years of the reign of her present Majesty, intituled "An Act to facilitate the Inclosure and Improvement of Commons and Lands held in common, the Exchange of Lands, and the Division of intermixed Lands; to provide Remedies for defective or incomplete Executions, and for the Non-execution of the Powers of general and local Inclosure Acts; and to provide for the Revival of such Powers in certain Cases;" and it is expedient that the said Act should be amended as hereinafter mentioned: Be it enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That where it shall appear to the commissioners that the terms and conditions of any provisional order heretofore issued, or which shall hereafter be issued, by the com- 8 & 9 Vict. c. 118.

Provisional orders of commissioners may be varied or amended.

missioners in the matter of an inclosure ought to be varied or amended, it shall be lawful for the commissioners, at any time before they shall have certified in their annual general report their opinion that the proposed inclosure would be expedient, or, in case the land proposed to be inclosed shall be land to the inclosure of which the previous authority of parliament shall not be necessary before they shall have caused notice to be given of their intention to proceed with such inclosure, whether the requisite consents shall or shall not have been taken to such provisional order, to make void and cancel the same, and to issue in lieu thereof such varied or amended provisional order as they shall think fit; and such deposit shall be made, and notice given, and other proceedings had thereupon, as by the said Act would have been required in respect of an original provisional order in the like matter; and in case any consents shall have been taken to a provisional order, and it shall not appear necessary to the commissioners wholly to cancel the same, then it shall be lawful for the commissioners, at any time before they shall have certified in their annual general report their opinion that the proposed inclosure would be expedient, or in case the land proposed to be inclosed shall be land to the inclosure of which the previous authority of parliament shall not be necessary, at any

time before they shall have caused notice to be given of their intention to proceed with such inclosure, to vary or amend the terms and conditions of such provisional order, or any of them, by a supplemental provisional order: Provided always, that in every case in which a supplemental provisional order shall be made, the commissioners shall cause a copy thereof to be deposited for inspection in the same manner as by the said Act required in reference to a provisional order, and shall cause notice to be given of such deposit, and shall by such notice specify the time within which dissents may be signified to such supplemental order; and unless persons the aggregate amount of whose interests in the land proposed to be inclosed shall exceed one third in value of the whole interest in such land shall, within the time so limited, signify in writing to the commissioners their dissent from such supplemental order, such order shall, for all the purposes of the inclosure, be deemed part of the provisional order.

Copy of supplemental orders to be deposited for inspection.

II. Provided always, and be it enacted, that where under the said Act the consent of the person interested in such land in right of a manor is required to an inclosure, or the dissent of any person or persons so interested might, in respect of his or their interest in right of a manor, have prevented an inclosure,

Supplemental order not to take effect unless consent of certain parties be obtained.

such supplemental order shall not take effect in case such person or persons respectively shall, within the time so limited, signify in writing to the commissioners his or their dissent from such order; and where the freemen, burgesses, or inhabitant householders of any city, borough, or town shall be entitled to rights of common or other interests in such land, no supplemental provisional order shall take effect without the like consents of the like number of such freemen, burgesses, and inhabitant householders as would have been required to the provisional order.

If orders do not take effect, commissioners may suspend proceedings.

III. And be it enacted, that in case any supplemental provisional order so issued shall not take effect by reason of dissents having been signified as aforesaid, the commissioners may, at their discretion, proceed as if such supplemental provisional order had not been issued, or may suspend all proceedings in the inclosure.*

* Under the original Act no power was given to the commissioners to recall or cancel provisional orders. It is understood that the commissioners had been advised that they might be compelled by application to the Court of Queen's Bench to proceed with an inclosure, the requisite consents to the provisional order having been given, even although subsequently to issuing the order they had become convinced that the inclosure was inexpedient, or the terms of the order unjust.

The first three sections of the first Amendment Act were framed to meet this inconvenience. The tithe commission

As to allotments for exercise and recreation, &c.;

IV. *And be it enacted, that where allotments for exercise and recreation, or for the labouring poor, or for any other public purpose, shall have been made the condition of any provisional or any supplemental provisional order, it shall be lawful for the commissioners, on the application in writing of the valuer, at any time before such valuer shall have made his award, under their seal, to allow an equal quantity of the land proposed to be inclosed to be allotted for either or both of the purposes aforesaid, or for any other public purpose, in lieu of that which may have been directed to have been allotted by

exercise a similar power of amending by means of their separate awards, and such a power is obviously necessary to every public body which has to deal with matters of complicated detail.

* The 26th sect. of the original Act provides that assistant-commissioners shall annex to their reports a map or sketch, on which shall be shown the place in which it shall appear to them that allotments for recreation and for the labouring poor should be made. And the 27th sect. required that the provisional order shall set forth the situation of these allotments.

It was found however, in practice, that the situation of the recreation allotment can often be more judiciously selected after the waste has been surveyed and the rights over it determined. The valuers who have completed their examinations and valuations will also be, in all probability, better judges of the requirements of the neighbouring population than an assistant-commissioner who has viewed only on one occasion.

This section of the first Amendment Act empowers the commissioners to change the situation or the appropriation of the public allotments (or both) at any time before confirmation, upon application of the valuers.

the original or any supplemental provisional order.

and allotments to lord of manor for right of soil, &c.

V.* And be it enacted, that it shall be lawful for the commissioners, by their provisional order in the matter of any inclosure, to make it a condition that there shall be awarded to the lord of the manor, instead of the whole or any part of the share or proportion of the residue of the land to which it shall be thereby declared he would have been otherwise entitled in respect of his right and interest as lord in the soil, and also, if they shall think fit, in lieu of any other allotment or allotments to which he may be found entitled in respect of any other rights or interests in the land proposed to be inclosed, such perpetual rent-

* This section supplies an omission pointed out in the first edition of this work, and which has been found of extensive inconvenience in practice. Lords of manors having no ancient land within their manors, or having but a life estate, were found unwilling to agree to inclosures, from a reluctance to expend the capital required for the creation of a new farm. Buildings, fences, drains, roads, &c., will often require an expenditure for which a tenant for life could obtain no adequate return. This section enables the commissioners to make it a condition of their provisional order that the lord shall receive a perpetual rent-charge instead of an allotment. This rent-charge is to be fixed, and not, like the tithe rent-charge, to vary with the price of corn; as the reasons which induced the legislature to make the tithe rent-charge a corn rent obviously do not apply to a sum fixed as an equivalent for the value of a known quantity of land.

charge or rent-charges of such aggregate amount as shall in the judgment of the valuer be equal to such share or proportion of the residue and such other allotment or allotments as aforesaid, as the case may be, and such rent-charge or rent-charges shall be awarded accordingly, and shall be recoverable by the same means as are by the Act of the seventh year of King William the Fourth, for the Commutation of Tithes in *England* and *Wales*, or any Act amending the same, given for recovering rent-charges charged under the last-mentioned Act; and the aggregate amount of rent-charge to which the lord shall be found entitled under this provision shall be charged by the valuer, as he shall deem convenient, as separate rent-charges or as one rent-charge, on the allotments or allotment to be allotted and awarded to any persons or person who shall consent thereto; and the valuer shall award to the person whose allotment shall be made liable to any such rent-charge, and as a portion of his allotment so charged, such addition in land as the valuer shall deem equivalent to such rent-charge; but in case such aggregate amount of rent-charge shall not be so charged, with consent as aforesaid, the valuer shall charge separate rent-charges making together the aggregate amount of rent-charge on all the allotments except the allotments for public purposes, in proportion to the value, in

the judgment of the valuer, of the respective allotments.

Award may be made by assistant-commissioner, subject to approval of commissioners, in certain cases of intermixed copyhold, customary, or freehold lands.

VI. And be it enacted, that where any copyhold or customary land shall be intermixed or held or occupied together with land of freehold tenure, or with copyhold or customary land held of another manor, or under other customs or titles, and such copyhold or customary land cannot be identified by the description thereof on the rolls of the manor, and the situation or boundaries of such freehold and copyhold or customary land respectively shall be unknown or ascertained, whether such lands shall or shall not be subject to be inclosed under the said recited Act, and whether any proceedings for an inclosure shall or shall not be pending, it shall be lawful for the commissioners, upon the application in writing of the persons interested in such lands, and with the consent of the lord or lords of the manor or respective manors of which such copyhold or customary land shall be holden, by order under their seal, to appoint and authorize an assistant-commissioner or any other person to award and declare what part of the lands so intermixed or held or occupied together shall be and be deemed copyhold or customary land and freehold land respectively, or shall respectively be held of each such manor or under each of such customs or titles re-

spectively, or to determine and declare the situation and boundary thereof, as the case may require; and such assistant-commissioner or other person shall frame a draft award, declaring which parts of such lands so intermixed or occupied should in his judgment be or be deemed copyhold or customary lands, for or in lieu of the copyhold or customary land or several copyhold or customary lands passed by the description or several descriptions in the court rolls, and for and in lieu of such freehold land respectively, with a map or plan annexed thereto; and the commissioners may, if they think fit, make such inquiries in relation to the matter of such draft award or any part thereof, and cause the same to be revised by such assistant-commissioner or other person; and in case such draft award, without or after such revision as aforesaid, shall appear satisfactory to the commissioners, they shall cause the same to be engrossed, and to be signed by such assistant-commissioner or other person, and shall approve the same under their seal; and from and after such approval the land described in such award shall be and be deemed of such tenures, and to be held of such manor and under such of the said respective customs or titles, as therein declared, and shall be subject to the same services, uses, trusts, and charges as the lands in respect of which they shall be awarded respectively; and a

copy of such award shall be delivered to the lord of the manor or of each manor to which the same may relate, or his steward, and shall be kept with and deemed part of the court rolls.

Application of provisions of recited act as to notices and dissents.

VII. And be it enacted, that the provisions of the said recited Act concerning notices and dissents in the case of an order of exchange shall apply to and have the same effect respectively in the case of such award as aforesaid as if the approval of such award were the confirmation of an order of exchange.

Boundaries of leaseholds may be declared in award setting out boundaries of copyhold or customary lands.

VIII.* And be it enacted, that where any land held by lease for years or for life or lives shall be intermixed with or held or occupied together with, or shall be alleged to be intermixed with or to be held or occupied together with, other land, and by reason of the descrip-

* These 6th, 7th, and 8th sects. confer upon the commissioners a power of great public utility, and the exercise of which will be extensively called for in many districts. It frequently happens, where one landowner holds contiguous lands by different tenures, that the boundaries are altogether lost, although the quantities remain well known.

In the case of glebe lands and of lands of ecclesiastical and collegiate corporations, the identity of which had been lost, an inexpensive process of ascertaining and setting out the boundaries had been supplied by the Tithe Commutation Acts, and by the stat. 2 & 3 Will. IV. c. 80. These sections extend this benefit to lands held under lay lords of copyhold and customary manors,

tion of the parcels in such lease being general and indefinite, or inapplicable to the actual condition of the property, or otherwise, the quantity, situation, or boundaries of such leasehold land cannot be ascertained, or differences or disputes shall have arisen concerning such quantity, situation, or boundaries, (whether such land shall or shall not be subject to be inclosed under the said recited Act, and whether proceedings for an inclosure shall or shall not be pending,) it shall be lawful for the commissioners, upon such application as hereinafter mentioned, in and by any order under their seal, to authorize or to appoint and authorize any assistant-commissioner or other person to award and declare what part of the lands so intermixed or held or occupied together, or alleged to be intermixed or held or occupied together, shall be and be deemed to be the land held under such lease, or to determine and declare the quantity, situation, and boundaries thereof, as the case may require; and any such authority, or appointment and

and also to lands held under beneficial leases from lay lessors.

In the north of England it is no unusual occurrence to find in the same field land held by freehold, copyhold, and customary tenures, and also land held on lease both for years and for lives; and in numerous instances no one parcel of these several lands can now be identified. The inconvenience to parties dealing with the titles of such lands is obvious. See page 110, ante.

authority, as last aforesaid, may be inserted in any order which shall also relate to copyhold or customary land, or may be made and given by separate order, as the case may require; and the assistant-commissioner or other person so authorized shall insert a declaration in his draft award, or shall frame a draft award, as the case may require, in like manner as hereinbefore provided in the case of copyhold or customary land, being intermixed or held or occupied as aforesaid; and the provisions hereinbefore contained for inquiries in the matter of a draft award concerning copyhold or customary land, and the revision thereof, and the engrossment, execution, and approval thereof, shall apply to a draft award and the declarations in a draft award concerning such leasehold land as aforesaid; and from and after the approval of the award concerning such leasehold land the land which shall be thereby declared to be or to be deemed leasehold land shall be and be deemed to be held under such lease, according to the intent of the declaration therein contained: Provided always, that every such order which shall authorize such assistant-commissioner or other person to proceed as aforesaid in relation to any such leasehold land shall be made upon the application in writing of the person who if the lease had not been granted would have been the person interested in the land therein comprised, and

Proviso.

also of the lessee or assignee of such lease, and of such sub-lessees and other persons as would have been persons (alone or jointly with any other person) interested in the land comprised in such lease, and upon the application also of the person interested in the land with which such leasehold land shall be intermixed or held or occupied, or alleged to be intermixed or held or occupied.

Copyhold and customary lands may be exchanged.

IX. And be it enacted,* that the provisions of the said recited Act respecting the exchange of lands, and respecting the division into convenient parcels and allotment of lands intermixed or divided into parcels of inconvenient form or quantity, (and respectively applicable to land not subject to be inclosed under the said Act, and to land so subject as to which no proceedings for an inclosure shall be pending,) shall extend and be applicable to lands of copyhold or customary tenure and the land taken in exchange under any order of exchange; and the land allotted under any order of division and allotment in respect of any copyhold or customary land shall be deemed copyhold or customary land, and shall be held of the lord of the same manor, under the same

* This provision corrects an omission in sect. 147 of the original Act; and, by sect. 7 of the 12 & 13 Vict. c. 83, (p. 369, post,) these provisions are extended to all incorporeal hereditaments.

rent, custom, and services as the copyhold or customary land in respect of which it may be so taken and allotted respectively was or ought to have been held, without any new admittance in respect of land so taken and allotted; and the land taken in exchange and the land allotted under such orders respectively in respect of freehold land shall be of freehold tenure: Provided always, that no such order of exchange or of division and allotment of or affecting any copyhold or customary land shall be confirmed by the commissioners unless the consent of the lord of the manor of which such copyhold or customary land shall be holden shall have been given, either to the application of the persons interested for such exchange or division and allotment, or to the exchange or division and allotment to which such order shall relate; and a copy of every such order, when confirmed, shall be delivered to the lord of such manor or his steward, and shall be kept with and deemed part of the court rolls of such manor.

Consent of lord of the manor required.

X. And be it enacted, that in every case where the consent of the lord of a manor is required under this Act a declaration or statement in writing under the hand of the steward or his deputy authorized to take surrenders or grant admittances of or to copyhold or customary lands in such manor, signifying that

Steward or deputy may consent in writing on behalf of the lord.

the lord has consented, shall be evidence of such consent for all the purposes of this Act; and a recital or statement of the consent of the lord of a manor contained in an award which shall be approved or in an order which shall be confirmed by the Commissioners shall, so far as respects the validity of such award or order, be conclusive evidence of such consent.

Shares of land and cattle gates and stints may be exchanged.

XI.* And be it enacted, that where a person interested in any undivided share, or any cattle gate or other gate, or any right of common defined by numbers or stints, in or to be exercised over any land, and a person interested in any undivided share or gate or right (so defined) in or to be exercised over any other land, shall be desirous of exchanging their respective shares, gates, or rights, whether such respective lands or either of them shall or shall not be subject to be inclosed under the said recited Act, and whether any proceedings for an inclosure of such respective lands or either of them shall or shall not be pending, it shall be lawful for the com-

* In the West Riding of York, and in other pastoral districts, stinted pastures are very numerous, and the rights of pasturage in these stinted pastures are ordinarily much divided. The same individual often holds one or more stints in several pastures in the same locality. The policy of allowing each stint-owner to consolidate his stints is obvious, but no such power was conferred by the original statute.

missioners, upon the application in writing of the persons interested in such shares, gates, or rights which they shall be so desirous of exchanging, or in such lands in respect of such shares, gates, or rights, to make an order of exchange of such respective shares, gates, or rights, without requiring the concurrence in such application of the other persons interested in such lands; and all the provisions of the said recited Act and this Act respecting the exchange of lands shall extend and be applicable to the exchange of such respective shares, gates, or rights; provided that, instead of the map or plan by the said recited Act directed to be annexed to an order of exchange, the commissioners may cause to be therein inserted or thereunto annexed such descriptions as may appear to them sufficiently to ascertain such respective shares, gates, or rights, and such respective lands as aforesaid.

Accuracy of maps to be certified.

XII. And whereas by the said Act provision is made for the adoption and use for the purposes of any inclosure under the said Act of a copy of any map or plan which shall have been confirmed under the hands and seal of the tithe commissioners, or of any other map or plan of the accuracy of which the inclosure commissioners shall be satisfied, or for making a new survey, map, or plan; be it enacted,

that every new survey, map, or plan which is used for the purposes of any inclosure under the said Act shall be signed by the said inclosure commissioners, after examination of the accuracy thereof under their direction, and sealed with their official seal in testimony of such examination.*

Any assistant-commissioner may be appointed assessor.

XIII. And whereas by the said recited Act it is provided that the valuer may in the cases therein mentioned be assisted by an assistant commissioner specially appointed as an assessor, who shall be a practising barrister-at-law of five years' standing at the least; be it enacted, that any assistant-commissioner under the said Act may be specially appointed as an assessor for the purpose aforesaid.

Act deemed part of recited act.

XIV. And be it enacted, that this Act shall be taken to be a part of the said recited Act, and be construed accordingly.

Act may be amended, &c.

XV. And be it enacted, that this Act may be amended or repealed by any Act to be passed in this present session.

* It is not understood that the inclosure commissioners are about to issue any instructions as to the requisites which they will insist upon in maps submitted to them. The tithe commissioners however have rules upon this subject which will be familiar to all land surveyors. They may be obtained of the tithe commissioners, or will be found appended to Mr. Shelford's edition of the Tithe Acts. I have not therefore thought it necessary to reproduce them in this work.

10 & 11 VICTORIÆ REGINÆ.

CAP. CXI.

An Act to extend the Provisions of the Act for the Inclosure and Improvement of Commons. [23*rd July*, 1847.]

WHEREAS an Act was passed in the session of parliament holden in the eighth and ninth years of her present Majesty, intituled "An Act to facilitate the Inclosure and Improvement of Commons and Lands held in common, the Exchange of Lands, and the Division of intermixed Lands; to provide Remedies for defective or incomplete Executions, and for the Non-execution of the Powers of general and local Inclosure Acts; and to provide for the Revival of such Powers in certain Cases:" And whereas it is expedient further to facilitate proceedings under the said recited Act in the cases hereinafter mentioned: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that where an action, suit, or difference shall be pending concerning

8 & 9 Vict. c. 118.

Where the title to a

the title to any manor, land, or right, or to an estate or interest therein, of which the actual owner would, under the definitions of the said Act, be (in respect of such manor, land, or right) the person interested in land concerning which any application or proceeding may be made or be pending under the said Act, the * consent of both the persons between whom such action, suit, or difference may be pending, to any application, inclosure, or other proceeding under the said Act, shall be as effectual as the consent of the actual owner of the manor, land, or right, or of such estate or interest therein, would have been in case no action, suit, or difference had been pending.

manor, &c., is litigated, the consent of both claimants to be equivalent to consent of actual owner.

II. Provided always, and be it enacted, that where, according to the claim of a party to such action, suit, or difference, more than one person would be or become interested as aforesaid in respect of such manor, land, or right, such consent of such number or portion, or (as the case may require) such non-signification of dissent by such number or portion of the persons who would so become interested, to the application, inclosure, or other proceeding as would have been sufficient in case such claim had been established shall be equivalent to the consent of the party so claiming under the provisions of this Act.

Provision for the case of more than one person claiming to be interested.

* See sect. 29 of the original Act.

Saving rights of the crown and others to the soil of encroachments.

III. And be it enacted and declared, that where any lands shall have been inclosed, by way of encroachment or otherwise, from any land subject to be inclosed under the said recited Act, for more than twenty years next preceding the day of the first meeting for the examination of claims in the matter of an inclosure under the provisions of the said Act, and shall not, with such consent as in the said Act provided, be directed by the valuer to be considered as allottable, and parcel of the land to be inclosed, neither the award, in the inclosure under the provisions of the said Act, nor any consents or orders previous thereto, shall be taken to divest, defeat, or prejudice any property, estate, right, or title of her Majesty or of any other person in or to the lands so inclosed for twenty years or upwards as aforesaid, or the minerals or substrata under the same, or in or to any rent or payment payable in respect thereof (except only any rights of common intended to be extinguished by the inclosure under the provisions of the said Act).

Exchanges may be made of land, excepting or reserving minerals and easements.

IV.* And be it enacted, that where an exchange shall be made under the said Act of lands not subject to be inclosed under such Act, or of lands subject to be so inclosed as to which no proceedings for an inclosure shall be pending, it shall and may be lawful for the

* See sect. 147 of the original Act.

commissioners, in conformity with the terms of the application for such exchange, to except or reserve out of such exchange the property or right of or to all or any of the mines or minerals under all or any part of the land given by both or either of the parties, together with rights and easements for or auxiliary to the exercise or enjoyment of the right or property of such excepted or reserved mines and minerals, and (whether such mines and minerals shall or shall not be reserved) such rights of way and other easements as the parties to such application may have agreed on.

Recital of provision as to commissioners not proceeding to amend any award under any local act, &c., until notice of application shall have been given by advertisement, &c.

V.* And whereas by the said recited Act of the eighth and ninth years of her present Majesty it is provided, that the commissioners shall not in any case proceed to amend any award under any local Act of Inclosure, or under the Act of the seventh year of the reign of King William the Fourth for facilitating the inclosure of open and arable fields in *England* and *Wales*, or to authorize the execution of any power or authority under any such local Act which shall have been lost or have become incapable of being executed, as therein mentioned, or to authorize any person to be by them appointed as therein mentioned to execute the powers or authorities of any local

* The provisions here repealed are contained in sect. 155 of the original Act.

Act, in the place of the commissioner or commissioners appointed under such local Act, until notice of the application shall have been given by advertisement as therein mentioned; and that in case, within two calendar months from the publication of the last of the advertisements, one fourth part in number or value of the persons interested, according to the definitions thereinbefore contained, in the land to which the award so proposed to be amended, or the part thereof proposed to be amended, should relate, or in the land to be affected by the exercise of such powers or authorities, should give notice in writing to the commissioners of their dissent from such application, the commissioners shall not proceed further on such application; be it enacted, that the said recited provision be repealed; and that in case the commissioners shall think fit to proceed on any such application as aforesaid the commissioners shall refer such application to an assistant-commissioner, and such assistant-commissioner shall hold such meeting or meetings to hear any objections which may be made to such application, and any information or evidence which may be offered in relation thereto, or to the matter thereof, and shall report his opinion as to the expediency or inexpediency of proceeding upon such application, having regard to all rights which may be disturbed or affected thereby, in such and the

Recited provision repealed, and if commissioners think fit to proceed on any application they may refer the same to an assistant-commissioner, &c.

same manner, and subject to such and the same provisions concerning notices of such meetings, as are in the said Act of the eighth and ninth years of her present Majesty contained concerning inquiries as to the expediency or inexpediency of a proposed inclosure; and upon the report of such assistant-commissioner it shall be lawful for the commissioners to proceed or to abstain from proceeding further on such application, as they may think fit; and it shall be lawful for the commissioners (where they shall so think fit) to cause such further meetings to be held, and inquiries made in relation to such application, or to the report thereupon, as might have been held or made in the matter of a proposed inclosure, and to give such directions in relation to the matter of such application, or to the execution of the powers or authorities thereby proposed to be revived or executed, as the circumstances of each case shall appear to them to require.

Lands taken in exchange, &c., in respect of copyhold or customary lands shall be held to be copyhold, and shall be held of the same lord, &c.

VI. And whereas it is provided by the said Act* that any land taken in exchange or on partition or allotted in respect of copyhold or customary land shall be deemed copyhold or customary land, and shall be held of the lord of the same manor under the same rent and by the same customs and services as the copy-

* Sect. 94.

hold or customary land in respect of which it may have been taken in exchange or on partition or allotted was or ought to have been held, and shall pass in like manner as the copyhold or customary land in respect whereof such exchanges, partitions, or allotments shall be made: And whereas it is expedient to enable the parties so taking such lands in exchange or on partition or as allotments to hold the same of freehold tenure; be it enacted, that, by and with the consent of the lord of the manor, and of the parties so taking such lands in exchange or on partition or as allotments, it shall and may be lawful for the said commissioners to declare that the same shall be held as of freehold tenure, on such terms and conditions as may be agreed upon between the parties, and as may be deemed just by the said commissioners, and the same land shall be held as freehold accordingly.

Meetings may be adjourned without the attendance of commissioner or assistant-commissioner.

VII. And be it enacted, that where notice shall have been given of any meeting, whether original or by adjournment, to be held by the commissioners or by an assistant-commissioner, or otherwise, it shall be lawful for the commissioners or an assistant-commissioner by notice to adjourn such meeting, without any commissioner or assistant-commissioner giving attendance for the purpose of making such adjournment; and where notice shall have

been given of a meeting by a valuer, it shall be lawful for him by notice to adjourn such meeting, without giving attendance for the purpose of making such adjournment.

Notices may be given by the secretary of the commissioners or other person appointed for that purpose.

VIII. And be it enacted, that all notices by the said Act of the eighth and ninth years of the reign of her present Majesty, or by any Act amending the same or referring thereto, or by this Act, directed or authorized to be given by the commissioners and assistant-commissioners respectively, may be given by the secretary of the commissioners, or by any person whom the commissioners or any assistant-commissioner in conformity with the power delegated to him by the commissioners, may appoint or authorize for that purpose.

Recited act deemed part of this act.

IX. And be it enacted, that this Act shall be taken to be a part of the said recited Act of the eighth and ninth years of the reign of her present Majesty, and be construed therewith, and with any Act amending the same or referring thereto.

Act may be amended, &c.

X. And be it enacted, that this Act may be amended or repealed by any Act to be passed in this session.

11 & 12 VICTORIÆ REGINÆ.

CAP. XCIX.

An Act to further extend the Provisions of the Act for the Inclosure and Improvement of Commons. [*4th September*, 1848.]

WHEREAS an Act was passed in the session of parliament holden in the eighth and ninth years of the reign of her present Majesty, intituled 8 & 9 Vict. c. 118. "An Act to facilitate the Inclosure and Improvement of Commons and Lands held in common, the Exchange of Lands, and the Division of intermixed Lands, to provide Remedies for defective or incomplete Executions, and for the Non-execution, of the Powers of General and Local Inclosure Acts, and to provide for the Revival of such Powers in certain Cases:" and whereas an Act was passed in the session of parliament holden in the ninth and tenth 9 & 10 Vict. c. 70. years of her present Majesty, intituled "An Act to amend the Act to facilitate the Inclosure and Improvement of Commons:" and whereas an Act was passed in the session of parliament holden in the tenth and eleventh 10 & 11 Vict. c. 111. years of her present Majesty, intituled "An Act to extend the Provisions of the Act for the Inclosure and Improvement of Commons:"

and whereas it is expedient that the provisions of the said Acts should be further extended: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for the commissioners in their provisional order in the matter of any inclosure to set forth any special agreement or matter concerning or affecting the lands to be inclosed, and to make the same a condition of such inclosure; and that where, after an application shall have been made to the commissioners to sanction an inclosure, or to certify the expediency of an inclosure, under the provisions of the said firstly-recited Act, any person interested within the meaning of the said Act in land not subject to the operation of the inclosure proposed to be made under such application shall, by application in writing to the commissioners, submit to the operation of the proposed inclosure such land, or any easement or other right or interest in such land, in consideration of any allotment, easement, or benefit to be made or secured under such inclosure, and shall specify his estate and interest in such land, the commissioners, if they shall think the proposal beneficial, may embody in their provisional order in the matter of the said inclosure any directions and agreements in

Persons not interested in lands to be inclosed may apply to submit land to operation of inclosure.

reference to such proposal, and make such directions and agreements a condition of such inclosure; and an award made in the matter of such inclosure, in pursuance of any provisional order containing such condition, and signed by the person making such application, shall have as full effect and be as binding, as well as respects the land or right or interest in land which shall have been so submitted to the operation thereof as the lands subject to be inclosed under the original application, as if the land or right or interest in land so submitted, had been land subject to be inclosed under the original application, and as if such person so interested had signed the same application: provided always, that if such person shall refuse or neglect to sign such provisional order, such inclosure may proceed as regards the land the immediate subject of such inclosure as if no application by such person had been made, and as if the directions and agreements in reference to such proposal had not been embodied in such provisional order: provided also, that no such direction or agreement as last aforesaid shall be embodied in a provisional order unless notice of the intention so to do shall have been given by advertisement in two successive weeks, and one calendar month shall have elapsed from the publication of the last of such advertisements; and in case before the expiration of such month

any person entitled to any estate in or to any charge upon the land to be so submitted to the operation of the inclosure shall give notice to the commissioners of his dissent from such direction or agreement, the commissioners shall not embody such direction or agreement in such provisional order unless such dissent shall be withdrawn, or it shall be shown to the commissioners that the estate or charge of the party so dissenting shall have ceased.

Maps of old inclosed lands may be dispensed with.

II. And whereas the provision of the said firstly-recited Act, * that the map to be annexed to the valuer's report shall comprise and show the lands in respect of which any allotments have been made, occasions unnecessary expense in certain cases: be it enacted, that it shall be lawful for the commissioners, in the matter of any inclosure, if they shall think fit, by order under their seal, to direct that such lands shall not be comprised nor shown in such map, and after such direction shall have been made by any such order in the matter of any inclosure, it shall not be necessary for the valuer to comprise or show any such lands in any such map to be annexed to his report.

Allotments of less than five pounds value may be compensated in money.

III. And be it enacted, that where the valuer, acting in the matter of any inclosure, shall certify in writing to the commissioners

* Sect. 102.

that the value of the allotment of any person interested in the lands to be inclosed, in case such allotment should be made, would not exceed five pounds in value, it shall be lawful for the commissioners, with the consent of such person, to direct the valuer under their seal to award to such person, in lieu of such allotment, a sum of money which he shall deem equivalent in value to the allotment which would have been made to him in respect of his right and interest under the said recited Act; and every such sum shall be set forth in the valuer's report before the same is deposited; and the sum of money which may be awarded in respect of such right and interest may be raised in the same way that money may be raised for expenses incident to inclosures under the provisions of the said recited Act, and shall be paid to the party for the time being interested, as in the case of surplus of purchase-money on the sale of part of an allotment for expenses.

Valuer may set out private and occupation roads in certain cases for use of lands other than lands to be inclosed.

IV.* And be it enacted, that the valuer acting in the matter of any inclosure may, where he shall think fit, set out such private or occupation roads and ways through the land to be inclosed as by reason of the alteration of public roads or ways, or otherwise,

* The powers of the valuer as to private roads are given by the 68th sect. of the original Act.

he shall think requisite for the use, wholly or in part, of persons interested in other lands; and any expenses which the valuer may incur in relation to the setting out or formation or completion of such private roads, or any of them, shall, unless the valuer shall otherwise direct, be paid by such of the owners for the time being of the land the subject-matter of such inclosure, and of the owners of land for whose use the said roads shall have been set out, or of either of such classes, and in such shares and proportion as the valuer shall direct; and after the formation and completion of such private roads and ways, the same shall be maintained and kept in repair by and at the expense of such of the said several owners, in such shares and proportions and in such manner as the valuer shall direct: provided always, that the grass and herbage on such roads shall be subject to the same regulations as if they had been private or occupation roads set out under the said firstly-recited Act.

Expenses of maintaining private roads, &c., may be raised by a rate on owners.

V. And be it enacted, that it shall be lawful for the valuer, with the sanction of the commissioners, by his award to direct that the expenses of repairing, cleansing, and maintaining all or any of the private roads and ways, common ponds, ditches, watercourses, embankments, tunnels, and bridges, thereby directed to be set out and made, enlarged, or

altered and maintained, shall be raised by rate to be levied on the lands of which the owners for the time being might have been directed by such award to repair, cleanse, and maintain the same roads, ponds, ditches, watercourses, embankments, tunnels, and bridges respectively, in such proportions as he shall by his award direct.

Rating officer may be appointed for repairing private and common ponds, ditches, &c.

VI. And be it enacted, that where the expenses of repairing, cleansing, and maintaining any private or occupation roads and ways, common ponds, ditches, watercourses, embankments, tunnels, or bridges shall have been directed to be raised by rate as aforesaid, a meeting shall be called by the commissioners of the owners of the lands subject to such rate, at such time after the confirmation of the award as the commissioners shall by notice on the church door appoint; and the major part in value of such owners present, by themselves or their agent authorized in this behalf, at such meeting, shall elect a fit person to be rating officer; and every such officer so to be elected as aforesaid, or to be elected or re-elected at any subsequent meeting, shall continue in office until the expiration of fifteen days after the day of the annual meeting of such owners, then next following, and no longer, unless he shall be re-elected at such annual meeting; and such owners shall ever

after such first meeting meet for the election of a rating officer on the first Monday in *February* in every year; and the owners assembled at such meetings shall from time to time fix, increase, or diminish the salary or payment to be made to every such rating officer; and any such rating officer may be removed by four fifths in value of the owners of such lands present, by themselves or their agents authorized in this behalf at any meeting called for the purpose, by fourteen days' notice on the church door, under the hands of any two such owners; and in case any such rating officer shall die while he shall hold such office, or shall be removed as aforesaid, it shall be lawful for the majority in value of owners of such lands present as aforesaid at any meeting, which upon such vacancy any two owners may call, by fourteen days' notice on the church door, to appoint a rating officer in his place, who shall hold the office until the expiration of fifteen days after the then next annual meeting; and a certificate in writing, under the hands and seals of two justices of the peace, of the election of any rating officer (which certificate any two justices of the peace are authorized, if they think fit, to give, on the request and upon the declaration of any owner of such lands, or the agent of any such owner, present at the meeting at which the election shall have taken place,) shall, in all matters and proceedings

whatsoever in which any acts done by any rating officer in the execution of his office shall be in question, be evidence that he was duly appointed rating officer.

How rates to be raised.

VII. And be it enacted, that the rating officer for the time being shall, subject to such orders and instructions in writing as may from time to time be agreed on by the majority in value of the owners of such lands as aforesaid at their yearly meetings, maintain and keep in order the said roads, ways, common ponds, ditches, drains, watercourses, embankments, tunnels, and bridges, and shall for the payment to be made to rating officers, and all expenses in and about the premises under the directions of any such meeting of owners from time to time, make a rate on the respective owners for such sum as the majority in value of owners present at such meeting shall think requisite, and every such rate shall be apportioned and paid by the owners according to the proportions directed by the award as aforesaid, and shall be paid to the rating officer on demand thereof, and in case the same shall not be paid within fourteen days after demand thereof shall be recoverable by such rating officer by distress; and any such demand or distress may be made of or on the occupier of any such land as if the occupier were the owner liable to the payment of such

rate, and such rate may be paid by any such occupier on demand thereof; and the money so paid by such occupier shall be deemed a payment on account of his rent, and shall be allowed by his landlord accordingly.

Money raised for expenses to be paid to commissioners.

VIII. And be it enacted, that where any persons shall, under the provisions of the said first-recited Act, mortgage their allotments or demise the same in trust, for the purpose of raising money to defray the inclosure expenses, the said money shall be paid to the commissioners, and the receipt of the commissioners shall be a sufficient discharge to the mortgagee or lessee for the receipt of such money; and such money shall be applied by the commissioners for the purpose for which it may be raised under the said recited Act.

How claims may be made.

IX.* And be it enacted, that notwithstanding anything in the said first-recited Act contained it shall be lawful for the valuer in the matter of any inclosure to receive any claims in writing made by any persons claiming any common or other right or interest in such inclosure, although such claims may not contain the several particulars in respect whereof they are made, nor distinguish the claims in respect of freehold, copyhold, or customary and leasehold property from each other, nor mention

* Sects. 47 & 48 in the original Act contain the provisions as to claims.

therein the places of abode of the respective claimants or their agents; but such claims shall be good and valid if the persons making the same shall state therein that they claim common or other right or interest in the land proposed to be inclosed in respect of the land, premises, or right named in such claims: provided always, that it shall be lawful for the valuer to require persons delivering any claims to amend the same in such particulars and on such conditions as the said valuer shall think just and reasonable, and no such claims shall be inserted in the statement of claims to be deposited by him under the provisions of the said Act until the places of abode of the respective claimants, or their agents, shall have been given in writing in the said claims or indorsed thereon.

How person trespassing where rights suspended or extinguished, or allotments entered upon, may be proceeded against.

X.* And be it enacted, that where the valuer acting in the matter of any inclosure shall, under the authority and direction of the commissioners, and in manner provided by the said first-recited Act, have ordered all or any part of the rights of sheep-walk, common, or other rights in and over the land to be inclosed, or any part thereof, to be extinguished, or the exercise thereof to be suspended, or where such valuer shall have directed any of

* See sect. 69 (p. 201, *ante*), sect. 95 (p. 231, *ante*), of the original Act; and sect. 10 of the 12 & 13 Vict. c. 83, *post*, p. 371.

the allotments to be made in such inclosure to be entered upon by the persons respectively for whom the same shall be intended, if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any fences, ditches, or other works made or done for the purposes of such inclosure, or to or upon any such allotment, the person so offending, being convicted thereof before two justices of the peace having jurisdiction in the county or place, shall forfeit and pay such sum of money as shall appear to such justices to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds, and such sum shall be paid to the valuer, to be applied by him in aid of the expenses in such inclosure, or to the person in possession of such allotment, as the justices may think fit and direct; and the provisions of the Act of the seventh and eighth years of King George the Fourth, intituled "An Act for consolidating and amending the Laws in *England* relative to malicious Injuries to Property," concerning the apprehension of offenders and the prosecution of offences punishable on summary conviction under such Act, and the form of such conviction, and concerning the cases of a summary conviction under such Act, where the sum which shall be forfeited for the amount of the injury done shall not be paid, and all other provisions of

7 & 8 G. 4. c. 30.

such Act consequent upon or in relation to such proceedings and conviction, shall be applicable to the offences under this Act, and the prosecution and conviction for the same respectively, save that any matter by the said Act directed to be done by the justice shall be done by two justices as aforesaid.

Person having taken possession of allotment may maintain action for damage.

XI. And be it enacted, that where the valuer acting in the matter of any inclosure shall have directed any of the allotments to be entered upon by the persons for whom the same shall be intended, it shall be lawful for any person who shall have entered upon or taken possession of any such allotment by virtue of such direction, or his tenant, to commence, prosecute, and maintain any action of trespass, ejectment, or other suit at law, for any entry upon or injury or damage that may be done or committed to such allotment, or the soil or herbage thereof, or the fences thereof, or for the recovery of the possession thereof, although the award in the matter of such inclosure may not have been made, without prejudice nevertheless to the power of the valuer, under the said Acts, to make alterations in allotments.

On neglect of owner of an allotment to fence, owner

XII. And be it enacted, that where any person to whom an allotment shall have been made by an award in the matter of any in-

closure, or the owner for the time being of such allotment, shall refuse or neglect to make any ditch or fence which, according to the directions of such award, ought to be made by or at the expense of the owner of such allotment, it shall be lawful for the owner or occupier of any other allotment made in the same inclosure, who shall be aggrieved in the enjoyment of his allotment by such refusal or neglect, to cause the person so refusing or neglecting to be served, in the manner hereinafter mentioned, with a written notice, signed by the owner or occupier so aggrieved, or his agent, of his intention to proceed under the authority of this Act to make such ditch or fence, in case the same should not be made within three calendar months from the time of serving such notice; and in case such ditch or fence shall not be made within such three calendar months, it shall be lawful for the owner or occupier so aggrieved, or his agent (if such owner or occupier shall so think fit), to make or cause to be made such ditch or fence in such manner as the same ought to have been made, according to the directions of the said award, by the owner so neglecting or refusing as aforesaid, and for such purpose, with labourers and workmen, to enter upon the allotment by the owner of which such ditch or fence ought to have been made, and to do all such acts as may be necessary or proper; and all costs and

of any other allotment prejudiced by his neglect may obtain possession and do the necessary work.

expenses incurred in such work by the owner or occupier so aggrieved shall be reimbursed to him by the owner so neglecting or refusing as aforesaid, and may be recovered by action of debt or on the case, and if the amount claimed in respect thereof shall not be more than twenty pounds shall be recoverable in the county court of the district where the work shall be done; and any notice as aforesaid may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the owner for the time being of the allotment to which such notice shall relate; but if such owner cannot be found, and his place of abode shall not be known, or admission thereto cannot be obtained for serving such notice, the posting of such notice conspicuously on the allotment to which the same shall relate shall be deemed good service on the owner thereof: provided always, that neither the power hereinbefore contained, nor the making of such ditch or fence by the owner or occupier so aggrieved as aforesaid, shall affect any right or remedy which such owner or occupier would otherwise have had in respect of the neglect to make such ditch or fence, or of any trespass or damage occasioned thereby.

Provisions of inclosure

XIII.* And whereas it is expedient that the

* See sect. 146 of the original Act; and pp. 100 and 104, *ante*.

provisions of the said recited Acts concerning exchanges should extend to partition: be it enacted, that it shall be lawful for the commissioners, upon the application in writing of the persons interested, according to the definitions in the said first-recited Act contained, in the several undivided parts or shares of any land not subject to be inclosed under the said first-recited Act, or in land subject to be inclosed under such Act as to which no proceedings for an inclosure shall be pending, and who shall desire to effect a partition of such land, to direct inquiries whether such proposed partition would be beneficial to the owners of such undivided parts or shares, and in case the commissioners shall be of opinion that such partition would be beneficial, and that the terms of the proposed partition are just and reasonable, they shall, unless notice of dissent to the proposed partition shall be given, under the provision herein by reference contained, cause to be framed and confirmed an order of partition, with a map or plan thereunto annexed, in which order shall be specified and shown the land allotted in severalty to each person so interested in respect of the undivided part or share in which he shall be so interested respectively; and the land allotted in severalty upon every such partition, in respect of each such undivided part or share, shall be and enure to, for, and upon the same uses, trusts, intents, and purposes,

Acts concerning exchanges of land not subject to be inclosed, &c., extended to partition.

altered and maintained, shall be raised by rate to be levied on the lands of which the owners for the time being might have been directed by such award to repair, cleanse, and maintain the same roads, ponds, ditches, watercourses, embankments, tunnels, and bridges respectively, in such proportions as he shall by his award direct.

Rating officer may be appointed for repairing private and common ponds, ditches, &c.

VI. And be it enacted, that where the expenses of repairing, cleansing, and maintaining any private or occupation roads and ways, common ponds, ditches, watercourses, embankments, tunnels, or bridges shall have been directed to be raised by rate as aforesaid, a meeting shall be called by the commissioners of the owners of the lands subject to such rate, at such time after the confirmation of the award as the commissioners shall by notice on the church door appoint; and the major part in value of such owners present, by themselves or their agent authorized in this behalf, at such meeting, shall elect a fit person to be rating officer; and every such officer so to be elected as aforesaid, or to be elected or re-elected at any subsequent meeting, shall continue in office until the expiration of fifteen days after the day of the annual meeting of such owners, then next following, and no longer, unless he shall be re-elected at such annual meeting; and such owners shall ever

after such first meeting meet for the election of a rating officer on the first Monday in *February* in every year; and the owners assembled at such meetings shall from time to time fix, increase, or diminish the salary or payment to be made to every such rating officer; and any such rating officer may be removed by four fifths in value of the owners of such lands present, by themselves or their agents authorized in this behalf at any meeting called for the purpose, by fourteen days' notice on the church door, under the hands of any two such owners; and in case any such rating officer shall die while he shall hold such office, or shall be removed as aforesaid, it shall be lawful for the majority in value of owners of such lands present as aforesaid at any meeting, which upon such vacancy any two owners may call, by fourteen days' notice on the church door, to appoint a rating officer in his place, who shall hold the office until the expiration of fifteen days after the then next annual meeting; and a certificate in writing, under the hands and seals of two justices of the peace, of the election of any rating officer (which certificate any two justices of the peace are authorized, if they think fit, to give, on the request and upon the declaration of any owner of such lands, or the agent of any such owner, present at the meeting at which the election shall have taken place,) shall, in all matters and proceedings

whatsoever in which any acts done by any rating officer in the execution of his office shall be in question, be evidence that he was duly appointed rating officer.

How rates to be raised.

VII. And be it enacted, that the rating officer for the time being shall, subject to such orders and instructions in writing as may from time to time be agreed on by the majority in value of the owners of such lands as aforesaid at their yearly meetings, maintain and keep in order the said roads, ways, common ponds, ditches, drains, watercourses, embankments, tunnels, and bridges, and shall for the payment to be made to rating officers, and all expenses in and about the premises under the directions of any such meeting of owners from time to time, make a rate on the respective owners for such sum as the majority in value of owners present at such meeting shall think requisite, and every such rate shall be apportioned and paid by the owners according to the proportions directed by the award as aforesaid, and shall be paid to the rating officer on demand thereof, and in case the same shall not be paid within fourteen days after demand thereof shall be recoverable by such rating officer by distress; and any such demand or distress may be made of or on the occupier of any such land as if the occupier were the owner liable to the payment of such

rate, and such rate may be paid by any such occupier on demand thereof; and the money so paid by such occupier shall be deemed a payment on account of his rent, and shall be allowed by his landlord accordingly.

Money raised for expenses to be paid to commissioners.

VIII. And be it enacted, that where any persons shall, under the provisions of the said first-recited Act, mortgage their allotments or demise the same in trust, for the purpose of raising money to defray the inclosure expenses, the said money shall be paid to the commissioners, and the receipt of the commissioners shall be a sufficient discharge to the mortgagee or lessee for the receipt of such money; and such money shall be applied by the commissioners for the purpose for which it may be raised under the said recited Act.

How claims may be made.

IX.* And be it enacted, that notwithstanding anything in the said first-recited Act contained it shall be lawful for the valuer in the matter of any inclosure to receive any claims in writing made by any persons claiming any common or other right or interest in such inclosure, although such claims may not contain the several particulars in respect whereof they are made, nor distinguish the claims in respect of freehold, copyhold, or customary and leasehold property from each other, nor mention

* Sects. 47 & 48 in the original Act contain the provisions as to claims.

shall appear to the said inclosure commissioners that there is any dispute or difference as to the parish or parishes in which such land or road, or any part thereof respectively, to be dealt with by such declaration, is situated: Provided also, that no award containing such declaration as aforesaid shall be confirmed by the inclosure commissioners, where it shall appear to them that the boundaries of any counties would be affected by such declaration, until notice in writing under the hand of the valuer of his intention to insert the same in his award shall have been served upon the respective clerks of the peace of the counties, the boundaries of which may be affected by such declaration, or shall have been left at their respective offices of business; and if within the space of fourteen days after the holding of the next general quarter sessions for each of such counties, or of the last of such respective sessions, a requisition in writing under the hand of the clerk of the peace of either of such counties, and countersigned by the chairman who shall have presided at such quarter sessions as aforesaid holden for the same county, requiring the omission of such declaration from such award, shall be sent to the inclosure commissioners, such commissioners shall not confirm such award with such declaration as aforesaid therein.

II. *And be it enacted, that whenever persons interested in any land to be inclosed under the provisions of the said recited Acts shall be entitled to any similar rights of common or other similar rights over the lands to be inclosed, and it shall appear to the valuer in the matter of such inclosure that it would be for the benefit of such persons to be dealt with as a class in the matter of such inclosure, it shall be lawful for the said inclosure commissioners, on the representation of the said valuer, to call a meeting of the persons interested, for the purpose of ascertaining whether two thirds in number of the persons present at such meeting shall be desirous of being dealt with as a class; and the commissioners shall, if they shall so think fit, appoint an assistant-commissioner to be present and preside at such meeting, and to take the votes of the persons present thereat; and such assistant-commissioner (if any) or the chairman of the meeting shall report to the said commissioners whether two thirds in number of the persons present at such meeting are desirous of being

Persons having rights of common may be dealt with as a class.

* See sect. 87 of the original Act. The effect of dealing with their rights as a class will be to empower the valuer to award one allotment for the whole class—to direct how the allotment shall be enjoyed by the persons interested in it—to let the allotment, and divide the rent—or to sell and invest the purchase-money. The commissioners do not appear to have power to sell and hand over a share of the purchase-money to any party absolutely entitled.

Class. dealt with as a class as aforesaid; and if it shall appear that two thirds of such persons are desirous of being dealt with as a class, it shall be lawful for the commissioners, by an order under their seal, if they shall so think fit, to direct that the persons entitled to such similar rights of common or other similar rights as aforesaid shall be dealt with as a class; and after such order all the provisions of the said recited Acts applicable to a class shall be applicable to the persons so interested in the matter of such inclosure, as if they had been a class under the provisions of the said recited Acts.

Meetings for instructions. III. And whereas doubts have arisen whether, under the provisions of the said first-recited Act, after a meeting shall have been holden to give instructions to a valuer in the matter of any inclosure, any other meeting after such first can be holden for the purpose of giving further instructions to such valuer in the matter of such inclosure:* be it declared and enacted, that in all cases where in the matter of any inclosure a meeting shall have been holden for the purpose of giving such instructions, it shall be lawful for the said commissioners to call other meetings to give further instructions to the valuer in the matter

* See sect. 34 of the original Act, p. 157, *ante;* and sect. 89 of the original Act, p. 224, *ante.*

of any inclosure, subject to all the provisions of the said first-recited Act as regards the first meeting held for the purpose aforesaid, so far as the same shall be applicable to the second or any subsequent meeting; and when any instructions shall have been given previously to the passing of this Act to the valuer in the matter of any inclosure at a meeting for such purpose subsequent to the first instructions, and allowed by the said commissioners, the same shall be as valid and of the same force and effect as if they had been given at the first meeting called for such purpose; provided that the commissioners shall not allow any instructions given at any second or subsequent meeting, whereby any arrangement entered into or made by the first instructions for the protection or convenience of any persons interested in the inclosure shall be prejudicially affected, if such persons, after such reasonable notice to be given for that purpose as the commissioners shall think fit, shall signify, in writing to the commissioners, their dissent from such subsequent instructions.

Commissioners may complete proceedings under 6 & 7 W. 4, c. 115.

IV. *And be it enacted, that all the powers and authorities in anywise enabling the said commissioners to complete proceedings under any local Act of Inclosure shall be applicable to proceedings commenced under the provi-

* See sect. 154 of the original Act.

sions of an Act passed in the seventh year of the reign of his late Majesty King William the Fourth, intituled "An Act for facilitating the Inclosure of Open and Arable Fields in *England* and *Wales*."

Quit rents, chief rents, and heriots.

V. And be it enacted, that it shall be lawful for the said commissioners in the matter of any inclosure, by the provisional order, or by any other order under their seal, to declare that an allotment or allotments in lieu of quit rents, chief rents, or heriots shall be given to the lord of the manor to whom such quit rents, chief rents, or heriots are payable out of any old inclosure in respect of which an allotment would be made, or would have been payable out of any allotments on the confirmation of the award, and the valuer shall upon the issue of such provisional or other order set out such allotment or allotments; provided always, that no such allotment in lieu of such quit rents, chief rents, or heriots shall be made except with the consent of such lord.

Balance of money raised by sale of land.

VI. And be it enacted, that where any moneys shall have been raised by sale of land in the matter of any inclosure for the expenses thereof, and any balance out of such moneys shall after the payment of such expenses remain in the hands of the inclosure commissioners, it shall be lawful for the said commis-

sioners to pay the same to the persons interested, in such proportions and under such restrictions or conditions as they shall deem just.*

Exchange and partition of rights, &c.

VII. † And be it enacted, that all the provisions of the said recited Acts applicable to the powers of exchange and partition under the said recited Acts shall extend and be applicable to the exchange of all rights of common, rights of fishing, manorial and other rights, and all easements over any land, and all quit rents, chief rents, heriots, tithes, and rent-charges for any other of the said rights, easements, and things, whether of the same or a like or different nature, or for land, and also to the partition of the same respectively; and when two or more persons shall be interested jointly, severally, as a class, or in common, in any rights or property proposed to be exchanged or partitioned under this or the said recited Acts, the application of two thirds in value of the persons so interested jointly, severally, as a class, or in common, as aforesaid, shall be deemed the application of all persons interested or having any estate therein.

* This provision applies to sections 134 to 142 of the original Act.

† This section extends the provisions of the 147th section of the original Act, and of section 9 of the first Amendment Act.

Separate tracts.

VIII. * And be it enacted, that where lands proposed to be inclosed under the said recited Acts shall consist of separate tracts in open common arable, meadow, and pasture lands or fields, entirely or in part, or of common or waste lands subject to rights of common, entirely or in part, or shall otherwise consist of separate and distinct tracts, and it shall appear to the said commissioners that two thirds in value of the persons interested in the entirety of such tracts shall have assented to the proposed inclosure on the terms and conditions in their provisional order specified, it shall be lawful for the said commissioners, if they shall see fit, to proceed therewith.

Extending provisions of recited acts to the fixing boundaries under this act.

IX. † And be it enacted, that all the provisions of the said recited Acts applicable to the ascertaining, setting out, and fixing the boundaries of any parish or manor in which the land proposed to be inclosed, or any part thereof, shall be situate, and of any parish or manor adjoining thereto, shall extend and be applicable to the ascertaining, setting out, and fixing of the boundaries of any township, vill, hamlet, or tithing not having separate overseers of the poor, and of a manor, although

* This sect. repeals the provision in sect. 28 of the original Act, *ante*, p. 150.

† See sect. 39 et subseq. of original Act, *ante*, p. 164.

the same shall not abut or adjoin upon any other manor.

How persons exercising acts of ownership where rights suspended or extinguished, or allotments directed to be entered upon, may be proceeded against.

X. * And be it enacted, that if in any case, after the valuer acting in the matter of any inclosure shall under the authority and direction of the commissioners, and in manner provided by the said first-recited Act, have ordered all or any part of the rights of sheepwalk, common or other rights, in or over the land to be inclosed, or any part thereof, to be extinguished, or the exercise thereof to be suspended, or after such valuer shall under the authority of the same Act have directed any allotment to be made in such inclosure to be entered upon by the person for whom the same shall be intended, any person, other than and except, as to any allotment directed to be entered upon, the person for whom such allotment is intended, shall exercise any act of ownership upon or in respect of any land the rights in, upon, or over which shall have been so extinguished or shall be so suspended, or any land so directed to be entered upon, whether by erecting huts or other buildings or erections thereon, or by putting up fences, or digging therein, † on being convicted thereof

* See sects. 69 & 95 of original Act, and sects. 10 & 11 of 11 & 12 Vict. c. 99.

† In engrossing this Act of Parliament certain words have been here accidentally omitted. The king's printer of course, follows the words of the engrossment. The

before two justices of the peace having jurisdiction in the county or place, shall forfeit and pay for and in respect of every such act of ownership such sum of money not exceeding five pounds as such justices shall think proper to inflict by way of penalty, and such sum shall be paid to the valuer, to be applied by him in aid of the expenses in such inclosure, or to the person lawfully in possession of such allotment, as the justices may think fit and direct; and the justices may by their order legally vest any property or effects erected or placed upon the land by the exercise of any such act of ownership in the valuer, to be removed, sold, and applied by him in aid of such expenses, or in the person lawfully in possession of such allotment, as the justices may think fit and direct; and the provisions of the Act of the seventh and eighth years of King George the Fourth, intituled "An Act for consolidating and amending the Laws in *England* relative to malicious Injuries to Property," concerning the prosecution of offenders punishable on summary conviction under such Act, and the form of such convic-

7 & 8 G. 4. c. 30.

omitted words are, "or otherwise any person doing or performing any such act of ownership, or being in any manner concerned in the doing or performance thereof." It is understood that the inclosure commissioners have taken the opinion of the law officers upon this circumstance, and have been advised that they may safely act upon the section.

tion, and concerning the cases of a s
conviction under such Act where th
which shall be forfeited for the amo
injury done shall not be paid, and all
provisions of such Act consequent upon or in
relation to such proceedings and conviction,
shall be applicable to the offences under this
Act, and the prosecution and conviction for
the same respectively, save that any matter
by the said Act directed to be done by the
justice shall be done by two justices as afore-
said: Provided always, that no remedy which
any person in possession of the land under a
direction by the valuer to enter thereon might
otherwise have in respect of any such Act of
ownership, under the fourthly above-recited
Act or otherwise, shall be in any manner pre-
judiced or affected by the provision last herein-
before contained.

Remedies independent of this provision to be unprejudiced.

XI.* And whereas doubts have arisen
whether, under the said recited Acts, a person
interested in several subject-matters of ex-
change, but held under separate titles, or for
distinct and separate interests, or subject to se-
parate charges or incumbrances, can effect an
exchange thereof: be it declared and enacted,
That the person so interested as aforesaid may
effect exchanges of such several subject-matters

Lands held under separate titles by the same person may be exchanged.

* See sect. 147 of the original Act.

of exchange in such and the same manner as if different persons had been interested therein.

Recited acts deemed part of this act.

XII. And be it enacted, that this Act shall be taken to be a part of the said recited Acts, and be construed therewith.

APPENDIX.

ANNO SECUNDO ET TERTIO GULIELMI IV. REGIS.

CAP. LXXI.

An Act for shortening the Time of Prescription in certain Cases. [1st *August*, 1832.]

WHEREAS the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being

Claims to right of common and other profits à prendre, not to be defeated after thirty years'

enjoyment by showing the commencement;

parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

after sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

In claims of right of way or other easement the periods to be twenty years and forty years.

II. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for

the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

III. And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Before-mentioned periods to be deemed those next before suits for claims to which such periods relate.

IV. And be it further enacted, that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or

acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

In actions on the case the claimant may allege his right generally, as at present.

V. And be it further enacted, that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

Restricting

VI. And be it further enacted, that in the several

cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim. the presumption to be allowed in support of claims hereinprovided for.

VII. Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible. Proviso for infants, &c.

VIII. Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by What time to be excluded in computing the term of forty years appointed by this act.

any person entitled to any reversion expectant on the determination thereof.

Not to extend to Scotland or Ireland.

IX. And be it further enacted, that this Act shall not extend to Scotland or Ireland.

Commencement of Act.

X. And be it further enacted, that this Act shall commence and take effect on the first day of Michaelmas term now next ensuing.

Act may be amended.

XI. And be it further enacted, that this Act may be amended, altered, or repealed during this present session of parliament.

FORMS.

THE following Forms have been sanctioned by the Commissioners. Many of them have been printed, and copies may be obtained by application at the Inclosure Office.

FORMS OF APPLICATION TO COMMISSIONERS.

I.—FORM OF APPLICATION FOR INCLOSURE.

Indicating the particulars of the information to be furnished to the Inclosure Commissioners for England and Wales, by persons proposing to inclose land under the provisions of the Act of 8th & 9th Victoria, c. 118.

Parish or townships, or several parishes or townships, or extra-parochial place or places, as the case may be. If the land is in any district not here properly named, insert the proper description. * Or counties.

The land to which the subjoined application relates, is situated in the of in the county* of and is commonly known as

1. What is the extent in statute acres of the land proposed to be inclosed?

State in the answer to this question whether the acreable extent is given from the parish map or from any other survey, or by estimation.

2. Does the land lie together? or is it in more than one, and in how many separate tracts? If in separate tracts, what is the acreable extent of each?

3. Is the land proposed to be inclosed waste and uncultivated land? arable, meadow, pasture, or woodland?

4. If of different kinds, what is the acreable extent of each?

5. What is the nature of the soil?

6. Are there any open mines, or any minerals, or valuable strata, now in course of being worked, or known to have been formerly worked, or known or supposed to exist in or under the land, and if so, what is the nature of these mines, minerals, or valuable strata, and the extent of the workings, if any, and is the property of these mines, minerals, and valuable strata separate from the ownership of the soil or otherwise, and are they worked by the owners or by lessees?

7. Is there any litigation, dispute, or question, as to the boundaries of the land proposed to be inclosed, or the mines, minerals, or strata in or under it? if so, between whom has it arisen?

8. Does the land proposed to be inclosed lie well together, so that it may be conveniently inclosed,

or is it intersected by, or does it surround any inclosures?

9. Does any town green or village green adjoin the land or any part of it; or is there any other town or village green in the parish or place within which the land proposed to be inclosed is situated?

10. Would any exchanges with owners of land not subject to be inclosed be desirable, for the purpose of straightening or improving the boundary in the event of an inclosure?

11. What is the number of the inhabitants of the parish, township, or place, or several parishes, townships, or places, in which the land proposed to be inclosed is situated, according to the last parliamentary census?

12. What is the occupation or what are the several chief occupations of the inhabitants, agricultural, manufacturing or otherwise, and what kinds of manufactures, if any, are chiefly carried on?

13. What is the city, town, or populous district, nearest to the land proposed to be inclosed, and what is the distance of such city, town, or populous district, from such land?

14. If there be more than one such city, town, or populous district, near such land, name them.

The number of inhabitants of

15. Is any part of the land proposed to be inclosed within fifteen miles of London; or within two miles

of any, and what, city or town of 10,000 inhabitants; or within 2½ miles of any, and what, city or town of 20,000 inhabitants; or within three miles of any, and what, city or town of 30,000 inhabitants; or within 3½ miles of any, and what, city or town of 70,000 inhabitants; or within four miles of any, and what, city or town of 100,000 inhabitants?

cities or towns is to be ascertained by the last parliamentary census, and the distance to be measured thus, viz.: Where there is a town hall, from the town hall of such city or town. Where there is no town hall, from the cathedral or church (if there be only one church), or if there be more than one church, from the principal market place of such city or town,—in a direct line.

16. What is the number, so far as can be ascertained, of the parties interested as owners of the soil, common rights, or otherwise, in the land proposed to be inclosed? How many of the persons so interested have assented to this application?

17. What proportion does the value of the interest of the assenting parties bear to the whole value of the interests in the land proposed to be inclosed?

18. How many of the parties interested have dissented from the application, and what is the proportion of their interest to the whole value of the interests in the land?

19. How have the values of interests been ascertained? by the assessment to the poor rate, by number of stints, or how otherwise?

If the land is in separate tracts, subject to separate and distinct rights, the parties interested in each tract, and the number and proportion in value of the assents and

20. Is all, or any, and if any, what part of the land proposed to be inclosed, waste land of a manor, on which the tenants of such manor have rights of common? If so, the name of the manor and of the lord.

dissents of the parties interested in each tract, should be stated.

21. Is all, or any, and if any, what part of the land proposed to be inclosed, subject to rights of common which may be exercised at all times of the year for cattle levant and couchant upon other land, or to any rights of common which may be exercised at all times of every year, and which are not limited by numbers or stints?

22. Is the land proposed to be inclosed, or any, and what part of it, subject to any, and what rights of common not mentioned in the two previous questions, or is all, or any, and what part of it, gated or stinted pasture, or what are the rights affecting such land, or the several tracts, if more than one, which are supposed to make it subject to be inclosed under the Act?

23. What are the supposed advantages of the proposed inclosure, in the increased productiveness of the land, the useful employment of labour, or otherwise?

24. Is it proposed that any, and if any, what allotment should be made for exercise and recreation?

25. Is it proposed that any, and if any, what allotment should be made for the labouring poor; and is the land, if any, proposed to be so allotted, convenient for the purposes of cultivation as gardens?

26. If the lord of the manor is entitled to the soil, what allotment has been agreed or is proposed

to be made to him in respect of his right and interest, and is the allotment proposed to include a compensation for his interest in all or any of the mines, minerals, and substrata?

We, the undersigned, being persons representing at least one third in value of all the interests in the land above mentioned, situated in the* of in the county† of proposing on behalf of ourselves and of the other persons interested to inclose such land, under the Act of 8th and 9th Victoria, c. 118, submit to the Inclosure Commissioners for England and Wales, the information in respect to such land and to the proposed inclosure written as Answers to the foregoing Questions, and we believe such information to be correct: And we hereby request the said Commissioners to sanction such inclosure, or to certify in their Annual General Report the expediency of such inclosure, as the case may require.

* Parish or township, or place or, several townships, parishes, or places [as the case may be].

† Or counties.

To the Inclosure Commissioners for England and Wales.

(Signed)

II.—FORM OF APPLICATION FOR EXCHANGE,

Under the 147th sect. of 8 & 9 Vict. c. 118.

To the Inclosure Commissioners for England and Wales.

We, the undersigned of in the county of and

of in the county of being the persons interested respectively under the provisions of the Act of the 8th & 9th Vict. c. 118, in the lands hereinafter mentioned,*

* And which are not subject to be inclosed under the said Act, or, which are subject to be inclosed under the said Act, and as to which no proceedings for an inclosure are pending [as the case may be].

and being desirous of effecting an exchange as hereinafter mentioned, hereby apply to you to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands; and in case you should be of opinion that such exchange would be beneficial, and the terms just and reasonable, to proceed with the same under the provisions of the said Act.

Lands in which the said is interested, situated in the Parish of in the County of and proposed to be exchanged for the Lands hereinafter specified:

Names of closes, number of statute acres, estate in land, &c., nature of tenure, nature of soil, and buildings if any.

Lands in which the said is interested, situated in the Parish of in the County of and proposed to be exchanged for the Lands hereinbefore set forth:

Names of closes, number of statute acres, estate in land, nature of tenure, nature of soil, and buildings if any.

Witness our hands, this day of 185 .

III.—FORM OF APPLICATION FOR DIVISION OF INTERMIXED LANDS,

Under the 148th sect. of 8 & 9 Vict. c. 118.

WE, the undersigned, being separately interested, according to the provisions of the Act of the 8th and 9th Vict. c. 118, in the parcels of land set opposite our respective names in the schedule hereunder written*
and which are so†
into parcels of‡
that the same cannot be§
to the best advantage, but which form together a tract which may be divided into convenient parcels. And being desirous to have the whole of such tract divided into convenient parcels, to be allotted in lieu of the old parcels,—hereby apply to you to direct an inquiry, whether such proposed division and allotment would be beneficial to the owners of such lands,—and in case you shall be of opinion that the proposed division and allotment would be beneficial, to proceed with the same under the provisions of the said Act.

* Which are not subject to be inclosed under the said Act, or, which are subject to be inclosed under the said Act, but as to which no proceedings for inclosure are pending [as the case may be].

† Intermixed or divided, or, intermixed and divided [as the case may be].

‡ Inconvenient form or inconvenient quality, or, inconvenient form and quality [as the case may be].

§ Cultivated or occupied, or, cultivated and occupied [as the case may be].

SCHEDULE ABOVE REFERRED TO.

Name, Residence, and Description of Owner.	Names and Quantities of Parcels.	Parish in which situate.	Estate of in Land.	Nature of Tenure.	Nature of Soil and Buildings, if any.

Witness our hands, this
day of 185 .

IV.—FORM OF APPLICATION,

Under the 121st sect. of the 8 & 9 Vict. c. 118.

WE, the undersigned, representing two-thirds of the value of the whole interest in* situate in the† of in the county ‡ of The whole of the same being already occupied as § The number of such ‖ being ¶ hereby apply to the Inclosure Commissioners for England and Wales to take proceedings for the purpose of making such pasture subject to the provisions of the Act of the 8th and 9th Vict. c. 118, concerning regulated pastures, without its being subject to the other provisions concerning lands subject to be inclosed under the said Act.

Signatures of Parties interested.

* Here insert name of land proposed to be inclosed.

† Insert name of parish or township, or, parishes or townships, or, extra-parochial place or places [as the case may be]. If the land be in any district not here properly described, insert proper description.

‡ or counties.

§ Gated or stinted pasture [as the case may be].

‖ Gates or stints [as the case may be].

¶ Number of such gates or stints.

V.—FORM OF APPLICATION TO COMMISSIONERS TO DEFINE INTERMIXED FREEHOLD AND COPYHOLD LANDS,

Under the 6th sect. of the First Amendment Act, 9 & 10 Vict. c. 70.

To the Inclosure Commissioners for England and Wales.

WHEREAS I, the undersigned of in the county of am the person interested, under the provisions of the Acts of the 8th and 9th Vict. c. 118, and the 9th and 10th Vict. c. 70, in certain copyhold land situate in the parish of in the county of held of the manor of in the said county, and described in the rolls of the said manor as .

And whereas the said copyhold land is intermixed with land of freehold tenure, in which I am also interested under the provisions of the said Acts.

And whereas such copyhold land cannot be identified by the said description, and the situation and boundaries of such freehold and copyhold land respectively are unknown.

And whereas of is the lord of the said manor.

Now I hereby apply to you to appoint and authorize an assistant-commissioner, or some other person, to award and declare what part of the lands so inter-

mixed shall be deemed freehold and copyhold land respectively, and to determine and declare the situation and boundaries thereof under the provisions of the said recited Acts.

Witness my hand

I of
the lord of the said manor, hereby testify my consent to the above application.

VI.—FORM OF APPLICATION TO COMMISSIONERS, TO EXCHANGE CATTLE GATES, &c.,

Under the 11th sect. of the First Amendment Act.

To the Inclosure Commissioners for England and Wales.

We, the undersigned
of in the county of
and of
in the county of
being the persons interested respectively under the provisions of the Act of the 8th and 9th Vict. cap. 118, in the*
the lands hereinafter mentioned; and being desirous of effecting an exchange, hereby apply to you to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective† and in case you should be of opinion, that such exchange would be beneficial, and the terms thereof just and reasonable, to proceed with the same under the provisions of the

* Undivided shares in (*or*) cattle gates or other gates, (*or*) rights of common defined by numbers or stints to be exercised over.

† Shares, gates, or rights.

said Act, and of the Act of the 9th and 10th Vict. cap. 70.

* in which the above-named is interested, and proposed to be exchanged for the * hereinafter specified.

* Shares, gates, or rights.

Number and Nature of Shares, Gates, or Rights.	Land over which the Rights, &c., are exercised.	Estate of Person interested.

Witness our hands, this day of in the year of our Lord one thousand eight hundred and fifty-

---

FORMS OF NOTICES BY INCLOSURE COMMISSIONERS.

I.—NOTICE OF PRELIMINARY INCLOSURE MEETING.

Inclosure.

WHEREAS an application for the inclosure of in the of in the county of has been duly made to "The Inclosure Commissioners for England

and Wales," pursuant to the provisions of the Act of the 8th and 9th Vict. c. 118:

And whereas the said application has been referred by the said Commissioners to me, an Assistant-Commissioner, duly appointed under the said Act:

I hereby give notice, that I shall hold a meeting on the day of next, at the hour of in the at in the of for the purpose of hearing any objections which may be made to the proposed inclosure, and any information or evidence which may be offered in relation thereto.

Witness my hand this day of 185

Assistant Inclosure Commissioner.

II.—NOTICE OF DEPOSIT OF PROVISIONAL ORDER.

We, the Inclosure Commissioners for England and Wales, hereby give notice, that a copy of the provisional order made by us, in the matter of the proposed inclosure of situate in the of in the county of , has been deposited at in the said of for the inspection of all persons interested in the said inclosure. And that it is our intention to the said proposed inclosure, upon

the terms and conditions in such order expressed, in case the consents required by the Act passed in the 8th and 9th years of the reign of Queen Victoria, cap. 118, shall be given within three calendar months from the date hereof.

And we further give notice, that a meeting will be holden by an assistant inclosure commissioner, for the purpose of taking the consents or dissents, and of ascertaining the interests of consenting and dissenting parties at
in the of , on
the day of
next, at o'clock in the noon, unless parties representing such an amount in value of the land proposed to be inclosed as shall be satisfactory to us, shall, in the mean time, signify to us their assent in writing to the said inclosure, on the terms and conditions of such provisional order.

Witness our hands, this day of
in the year of our Lord 185 .

III.—NOTICE OF COMMISSIONERS ENLARGING TIME FOR CONSENTS.

WHEREAS the Inclosure Commissioners for England and Wales duly made a provisional order in the matter of the proposed inclosure of
situate in the
in the county of
dated the day of
last.

And whereas the said commissioners by a notice in writing, dated the day of last, declared that it was their intention to the said proposed inclosure upon the terms and conditions in such order expressed, in case the consents required by the Act passed in the 8th and 9th years of the reign of her present Majesty, c. 118, should be given within three calendar months from the date of the said notice.

And whereas it appears expedient to the said commissioners, in pursuance of the power given to them in that behalf by the said Act, to allow an enlarged time for the purpose of giving such consents.

Now therefore, we, the undersigned Inclosure Commissioners for England and Wales, hereby give notice, that we shall the said proposed inclosure upon the terms and conditions in the said order expressed, in case the consents required by the said Act shall be given on or before the day of next.

Witness our hands, this day of , in the year of our Lord 185 .

IV.—NOTICE OF INTENTION TO PROCEED WITH INCLOSURE.

Inclosure.

WHEREAS pursuant to the provisions of the Act passed in the 8th and 9th years of the reign of her

present Majesty, c. 118, in the matter of the inclosure of
situate in the of
, in the county of
Persons, the aggregate amount of whose interests in the land proposed to be inclosed exceeds in value two thirds of the whole interest in such land
have consented to such inclosure upon the terms and conditions of the provisional order under the seal of the Inclosure Commissioners for England and Wales, dated day of 184 .

We, the said commissioners, hereby give notice, that it is our intention to proceed with such inclosure under the provisions of the said Act.

Witness our hands, this day of
, 185 .

V.—NOTICE OF MEETING TO APPOINT A VALUER.

We, the undersigned Inclosure Commissioners for England and Wales, hereby give notice, that a meeting of the persons interested in ,
situate in the of
, in the county of ,
will be held on the day of
next, at the hour of
in the noon, at the
in the of for
the purpose of appointing a valuer in the matter of the inclosure of the said ,

under the provisions of the Act passed in the 8th and 9th years of the reign of her present Majesty, c. 118.

And, we further give notice, that a majority in number, and in respect of interest of such persons, may, at such meeting, resolve upon instructions to the valuer, not inconsistent with the terms and conditions of the provisional order made by us in the matter of the said inclosure.

Witness our hands, this
day of , in the year of our Lord
185 .

VI.—NOTICE OF DEPOSIT OF INSTRUCTIONS TO VALUER, AND OF MEETING THEREON.

We, the undersigned Inclosure Commissioners for England and Wales, hereby give notice, that a copy of the instructions to the valuer
by us, in the matter of the inclosure of
situate in the of
in the county of
has been deposited at
in the said parish, for the inspection of all persons interested in the said inclosure.

And we further give notice, that a meeting of the persons interested as aforesaid will be holden for the consideration thereof at
in the of ,

on the day of next at
o'clock in the noon.

Witness our hands, this
day of in the year of our Lord
185 .

Fourteen days' notice must be given of this Meeting.

VII.—NOTICE OF PROCEEDING TO SET OUT BOUNDARIES.

WHEREAS it has been represented to the Inclosure Commissioners for England and Wales by the valuer acting in the matter of the inclosure of
situate in the
of in the county of
that the boundaries of the said
of and of the adjoining
of in the said
county are not sufficiently ascertained and distinguished.

And whereas the said Inclosure Commissioners have duly appointed me, the undersigned, an assistant-commissioner under the provisions of the Act of the 8th and 9th Vict. c. 118, to ascertain and set out the said boundaries.

I hereby give notice, that I shall proceed to ascertain and set out the said boundaries on the
day of next, and that I shall
attend for that purpose at

in the said of at the hour of in the forenoon.

Witness my hand, this day of , in the year of our Lord 185 .

VIII.—NOTICE OF DEPOSIT OF VALUER'S REPORT.

We, the undersigned Inclosure Commissioners for England and Wales, hereby give notice, that a copy of the report of the valuer acting in the matter of the inclosure of situate in the of in the county of has been deposited at in the said parish, for the inspection of all persons interested in the said inclosure.

And we further give notice, that we shall, by ourselves, or by an Assistant Inclosure Commissioner, hold a meeting at in the of on the day next at o'clock in the noon, for the purpose of hearing objections to any allotment direction, determination, or matter in the said report.

Witness our hands, this day of in the year of our Lord 185 .

Twenty-one days' notice must be given of this meeting.

FORMS OF NOTICES BY VALUER.

I.—VALUER'S NOTICE OF MEETING TO RECEIVE CLAIMS.

Inclosure.

I
of in the county
of the valuer acting in the matter
of the inclosure of of
situate in the of in the
county of hereby give notice, that
I shall hold a meeting on the day of
at
in the said of
at o'clock in the noon for
the purpose of receiving claims in writing from all persons claiming any common or other right or interest in the said
and such claims must state the several particulars in respect whereof they are made, distinguishing the claims in respect of freehold, copyhold, customary, and leasehold property from each other, and mentioning therein the places of abode of the respective claimants, or their agents, at which notices in respect of such claims may be delivered.

Given under my hand, this day

of , in the year of our Lord 185 .

N.B.—Fourteen days' notice at least must be given of this meeting by the above being inserted in some Newspaper printed or usually circulated in the County in which the Land to be inclosed is situate, and affixed on the principal outer door of the Church of every Parish and Ecclesiastical District in which the Land or any part thereof is situate, on Sunday before Divine Service.

II.—VALUER'S NOTICE OF DEPOSIT OF STATEMENT OF CLAIMS.

Inclosure.

I, of in the county of the valuer acting in the matter of the inclosure of situate in the of in the county of hereby give notice, that a statement of all claims received by me in the matter of the said inclosure has been deposited at in the said parish, for the inspection of all persons interested in the said inclosure.

And I further give notice, that any objection to a claim must be delivered in writing to me, and a copy of such objection must also be delivered at the place

of abode of the claimant, or his agent, on or before the day of next.

Given under my hand, this day of , in the year of our Lord 185 .

III.—VALUER'S NOTICE OF MEETING TO EXAMINE AND DETERMINE CLAIMS.

Inclosure.

I, of in the county of the valuer acting in the matter of the inclosure of situate in the of in the county of hereby give notice, that I shall hold a meeting on the day of , at in the said of at o'clock in the noon, for the examination of and determining claims in the matter of the said inclosure and for the attendance of all parties concerned therein.

Given under my hand, this day of , in the year of our Lord 185 .

N.B.—Fourteen days' notice at least must be given of this

Meeting by the above being inserted in some Newspaper printed or usually circulated in the County in which the Land to be inclosed is situate, and affixed on the principal outer door of the Church of every Parish and Ecclesiastical District in which the Land or any part thereof is situate, on Sunday before Divine Service.

IV.—NOTICE OF DEPOSIT OF SCHEDULE OF CLAIMS.

Inclosure.

I,
of in the county of
the valuer acting in the matter
of the inclosure of
situate in the of
in the county of hereby give notice,
that a schedule of all claims and objections which have been made in the matter of the said inclosure, and of my determinations thereon, has been deposited at in the said parish, for the inspection of all persons interested therein.

Given under my hand, this
day of , in the year of our Lord
185 .

V.—VALUER'S NOTICE TO ENCROACHERS.

_____ *Inclosure.*

To

I,
of in the county
of the valuer acting in the matter
of the inclosure of
situate in the of
in the county of hereby give you
notice, that the encroachment from the said
now in your possession is,
with the residue of the said ,
about to be divided, allotted and inclosed, and that you are at liberty within two calendar months from the receipt of this notice to take down and remove all buildings, fences, and other erections now standing on the said encroachment, and to convert the materials thereof to your own use.

Given under my hand, this
day of in the year of our Lord
185 .

Notice under 50th sect. of Act of 8 & 9 Vict. c. 118.

VI.—VALUER'S NOTICE AS TO ROADS AND WAYS.

Inclosure.

I,
of in the county of
the valuer acting in the matter of
the inclosure of
situate in the of
in the county of hereby give notice,
that *
intended to be †
from and after the ‡ day of next.

Given under my hand, this
day of in the year of our Lord
185 .

* Describe the roads or ways intended to be dealt with.

† Discontinued and stopped up or diverted or altered, in which latter cases the diversion or alteration must be set out.

‡ Not being less than 4 months after the 1st Sunday on which the above notice is given.

N.B.—This notice must be affixed at each end of the Roads or Ways intended to be stopped, &c.; inserted for four successive weeks in some Newspaper printed or usually circulated in the County in which the Land to be inclosed is situate, and affixed on the principal outer door of the Church of every Parish and Ecclesiastical District in which the Land or any part thereof is situate, on the four Sundays of the said four successive weeks before Divine Service.

The Notice must be affixed on the Church doors on the Sunday previous to the publication in the Newspaper.

FORM OF ORDER OF EXCHANGE.

WHEREAS
the person interested under the provisions of the Act passed in the 8th and 9th years of the reign of her present Majesty, cap. 118, in the land specified in the first schedule hereunder written, situate in the parish of
in the said county of
and

the person interested under the provisions of the said Act, in the land specified in the second schedule hereunder written, also situate in the said parish of
which said lands respectively are not subject to be inclosed under the said Act (or leaving out "not"), but as to which no proceedings for an inclosure are pending, being desirous of effecting an exchange of the same lands, made due application to the Inclosure Commissioners for England and Wales to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands, and in case they should be of opinion that such exchange would be beneficial, and the terms thereof just and reasonable, to proceed with the same under the provisions of the said Act.

And whereas due notice by advertisement in three successive weeks of the said proposed exchange has been given as required by the said Act.

And whereas three calendar months have elapsed

from the publication of the last of such advertisements, and no notice of dissent from such proposed exchange has been given to the said Commissioners.

And whereas the said Commissioners having duly made inquiries are of opinion that such exchange would be beneficial to the owners of such respective lands, and that the terms thereof are just and reasonable.

Now therefore we, the undersigned Inclosure Commissioners for England and Wales for giving effect to the proposed exchange—do by virtue of the power given to us in that behalf by the said Act, by this order of exchange under our hands and seal, order and declare that the pieces or parcels of land specified in the first schedule hereunder written and shown on the plan hereunto annexed, and thereon coloured shall be taken by, and henceforward become the land of the said in exchange for the pieces or parcels of land specified in the second schedule hereunder written and also shown on the said plan, and thereon coloured which shall be given by the said

And that the said pieces or parcels of land specified in the said second schedule, and shown on the said plan, and thereon coloured as aforesaid, shall be taken by and henceforward become and be the land of the said in exchange for the said pieces or parcels of land specified in the said first schedule, and shown on the said plan, and thereon coloured as aforesaid which shall be given by the said

The First Schedule above referred to :—Land situate in the parish of
in the county of
given in exchange to and taken by the said

No. on Plan.	Names of Closes.	Extent.		
		A.	R.	P.

The Second Schedule above referred to :—Land situate in the parish of
in the county of
given in exchange to and taken by the said

No. on Plan.	Names of Closes.	Extent.		
		A.	R.	P.

In witness and confirmation whereof, we have hereunto subscribed our respective names, and caused our official seal to be affixed, this day of
in the year of our Lord, one thousand eight hundred and fifty-

FORMS OF CLAIMS.

THE Inclosure Commission has issued no forms for the claims to be given in to the valuer. They will be necessarily very various and must generally be specially drawn to meet the circumstances of the particular case. A few are submitted by the Editor, which will probably be found useful in cases of the most common occurrence.

I.—CLAIM OF RIGHT OF COMMON OF PASTURE OVER COMMON LANDS.

To the Valuer acting in the matter of the Inclosure of the Common of , in the Parish of , and County of

I, A. B., of in the county of , being seised in my demesne as of fee of a certain estate, called the Manor Farm, situate in the parish of and consisting of 160 acres of freehold land, do hereby claim to be entitled for and in respect of the whole of the said freehold estate, to common of pasture in, upon, and throughout the said place called for all my commonable cattle, levant and couchant, in and upon my said estate called the Manor Farm, every year, at all times of the year, as to the said freehold estate called the Manor Farm belonging and appertaining.

I.—CLAIM OF COMMON OF PASTURE OVER COMMONABLE LANDS.

To the Valuer acting in the matter of the Inclosure and Division of certain Common Fields in the Parish of and County of

I, A. B., being seised in demesne as of fee of a certain messuage, and acres of land, with the appurtenances, lying in the parish of in the county of do claim as follows:—Whereas there now are, and from time whereof the memory of man is not to the contrary, there have been lying and being in the said parish of , in the county of , three common fields, that is to say, one common field called the Home Field, one other common field called the Lower Field and, one other common field called the Upper Field, and which said three several common fields have, from all the said time immemorial, been used and accustomed to be, and ought to be, tilled and cultivated, in every year in rotation, and successively, one of the said three fields hath been, and of right ought to be sown with wheat, or other corn or grain, and in and during that year hath been usually known and distinguished by the name of the Wheat Field; and another of the said common fields hath in such year been usually known and distinguished by the name of the Barley Field; and the other of the said common fields hath in such year lain and ought to be known and distinguished by the name of the Fallow

Field, or Summer-tilled Field, so that by such ro
tation, each and every of the said three fields ha
been and ought to be, one year sown with wheat
or other corn or grain, another year sown with bar
ley, or other corn or grain, and the third year hath
lain, and ought to be fallow and summer-tilled in
rotation: Now I, the said A. B., do claim by reason
of being so possessed of my messuage and lands
with the appurtenances, to have common of pastur
yearly and every year in and throughout such of th
said common fields as by and according to the sai
rotation hath lain, or ought to be fallow and be sum
mer-tilled, my own land in that field only excepted
for fifty sheep, levant and couchant, in and upon m
said messuage and lands, with the appurtenances, i
every such year.

III.—CLAIM OF COMMON OF PASTURE,

Under the 2 & 3 Will. IV. c. 71.

*To the Valuer acting in the matter of the Inclosur
of the Common of in the Parish
of , and County of*

I, A. B., of in the county o
being seised in my demesne a
of fee of a certain estate called the Manor Farm
situate in the parish of in th
county of and consisting of on
hundred acres of freehold land, do hereby claim t
be entitled for and in respect of the whole of th
said freehold estate, to common of pasture in, upon

and throughout the said place, called the common, for all my commonable beasts, levant and couchant, in and upon my said estate called the Manor Farm, every year, and at all times of the year, as to the said freehold estate called the Manor Farm belonging and appertaining; and I do claim the said right of common by reason of such right having been actually taken and enjoyed by myself and by those whose estate I hold, claiming right thereto, without interruption, for the full period of thirty years [or, for the full period of sixty years, as the case may be], according to the provisions of an Act made and passed in a session of parliament held in the second and third years of the reign of his late Majesty King William the Fourth, intituled "An Act for shortening the Time of Prescription in certain cases."

*IV.—FORM OF CLAIM BY LORD OF A MANOR BOTH AT COMMON LAW AND UNDER THE PRESCRIPTION ACT.

To the Valuer acting in the matter of the Inclosure.

I,
of in the parish of
and county of
being the lord of the manor of
do hereby claim to have and exercise as such lord of

* This form contains no claim in respect of the manorial rights, as the compensation for these is supposed to have been provided for in the provisional order.

the manor of a right of common of pasture upon all the common or commonable lands in and especially upon all the common lands of now about to be inclosed, for all cattle levant and couchant upon my lands in aforesaid, which lands are well known by metes and bounds, and contain by estimation a. r. p. more or less.

And I claim to receive an allotment upon the inclosure of the said common in respect of such my right.

And as such lord of the manor aforesaid, I further claim such common right and interest in the land proposed to be inclosed as aforeclaimed in respect of the said manor of and of the lands thereof in the person or ownership of the lord, by reason that such common rights and interest have been actually enjoyed by me and by my predecessors in title, lords of the manor of claiming right thereto without interruption for the full periods mentioned in and required by a certain Act of Parliament, made and passed in the session of a Parliament held in the second and third years of the reign of his late majesty, intituled "An Act for shortening the Time of Prescription in certain Cases."

And I, the said further claim that I am the owner of six commonable messuages or tofts, which said six commonable messuages or tofts are well known by metes and bounds in the said manor of and are now in the respective occupations of

nd I claim an allotment or allotments, as such toft wner as aforesaid, from the lands now proposed to e inclosed.

And I further claim such common right and interest in the land proposed to be inclosed as aforeclaimed in respect of the said six commonable messuages or tofts, by reason that such common right nd interest has been actually enjoyed by me and ny predecessors, owners or occupiers for the time being of the said respective commonable messuages or tofts, claiming right thereto without interruption for the full periods mentioned in and required by a certain Act of Parliament made and passed in a session of Parliament held in the second and third years of the reign of his late Majesty, intituled "An Act for shortening the Time of Prescription in certain Cases."

FORM OF CLAIM UNDER 11 & 12 VICT. C. 99, SECT. 9.

To the Valuer acting in the matter of the Inclosure.

WE, A. B. and C. D., the duly authorized agents of E. F., do hereby give you notice, that the said E. F. is seised as of fee of certain lands in the parish and manor of in the county of which lands are specified and set forth in the schedule hereto annexed; and on behalf of the said E. F., we do hereby claim to be entitled to common of pasture upon the commons about to be

inclosed under the conditions contained in the provisional order by the Inclosure Commissioners for England and Wales in that behalf made and confirmed for all commonable beasts levant and couchant upon the said land; and we further claim in respect of the said lands, and in behalf of the said E. F., all right of common of estovers, turbary common in the soil and piscary upon the said common about to be inclosed as aforesaid, and we claim allotments in respect of such rights. And we further give you notice, that the place of abode of us, the agents to the said claimant, is No. Whitehall Place, in the city of Westminster.

Dated this day of 185 .

A. B.
C. D.

SCHEDULE REFERRED TO IN THE ABOVE CLAIM.

Occupier.	Description of Close.	Quantities.		
		A.	R.	P.
John Styles . .	Arable	5	0	4
	Blackacre—meadow .	10	2	23
	Cottage and garden . .	0	1	12
Richard Yeoman	Twenty-acre field—arable	21	0	4
	The Marsh—pasture .	30	1	17
	Total . . .	67	1	20

ADDENDUM.

THE following should have been inserted at page 187, as a note to sect. 56.

It is to be observed that although this section provides that final judgment may be obtained upon the verdict given, and that the costs shall abide the event; yet the Act omits the usual provision that in case the plaintiff does not proceed to trial within the time allowed, the defendant shall have judgment as in case of a nonsuit, and his costs.

This case has already occurred. In *Hancock* v. *The Earl of Carlisle and others, Inclosure Commissioners*, an action had been commenced against the Commissioners under the 56th sect. of the Inclosure Commission Act, and an issue tendered and accepted. The land which was the subject of inclosure lay in the county of Chester, and two assizes having intervened and the plaintiff not having proceeded to trial,

Welsby (in the Exchequer, Michaelmas, 1849) obtained a rule nisi for judgment as in case of a non-

suit, and after argument in the same term the rule was made absolute. The Court held that if the plaintiff in an action on a feigned issue under the provisions of the Inclosure Act fails to go to trial at the first or second assizes after the issuing of his writ, a rule for judgment as in case of a nonsuit may be obtained against him, although the 56th sect. of the Act says that the costs shall abide the result of the trial, and although the statute under which the Court has its general authority to give judgment as in case of a nonsuit, also authorizes a discharge of the rule upon a peremptory undertaking, and that provision cannot be acted upon in a suit under the Inclosure Commission Act, because the time for going to trial is limited by that Act. *Wick* v. *Cotton*, 1 D. & L. 447; *Sandys* v. *Corporation of Beverley*, 12 M. & W. 568; *Croughton* v. *Blake*, 12 M. & W. 205; *Baker* v. *Brick*, 12 Man. & G. 307; *Tomlimson* v. *Boughey*, 2 C. B. 846, were cited in argument.

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Stevens and Co., Printers, Bell Yard, Lincoln's Inn.

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